

# **Circumcision in Australia: Reforming the Law**

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Submitted in fulfilment of the requirements of  
the degree of Master of Laws.

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### Abstract

The thesis considers the application of Australian law to male circumcision and recommends law reform to improve its regulation. There are no specific laws that regulate the practice in Australia. Very few clear answers present themselves when the general law is applied to circumcision. The law suffers from inaccessibility, uncertainty, jurisdictional inconsistency, and problems with enforceability in its application to circumcision. It is also unable to respond in a timely and effective manner to problematic developments, and has not significantly assisted in fostering improved health and ethical standards for circumcisers.

The thesis discusses the application of criminal law, family law, private law and human rights to the practice of circumcision. It also discusses the legislation in foreign jurisdictions which specifically addresses male circumcision. The thesis adopts the analytical perspective of an implementation minded law reformer. This perspective is used to inform the critical analysis of the law and the law reform recommendations proposed. The perspective is pluralistic and concerned with formulating reforms that are designed for ready implementation.

The thesis recommends the enactment of a federal Circumcision Act, or mirror State and Territory Circumcision Acts. This legislation should establish a circumcision regulatory, monitoring and licensing body within the jurisdiction it operates in. The Act (or Acts) recommended distinguish between circumcision performed with patient consent, and circumcision performed upon incapable minors with parental consent. The thesis recommends, subject to specific exemptions, the prohibition of circumcision performed on incapable minors. The thesis also details law reform to improve the health and ethical standards of circumcisers in Australia.

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# Part I

## Background

## Chapter 1

# Introduction

This thesis is concerned with the application of Australian law to non-therapeutic male circumcision. Male circumcision has been practised in Australian medical facilities since before federation,<sup>1</sup> and has been performed in Australia from time immemorial by some of its Indigenous communities.<sup>2</sup> Almost twenty thousand circumcisions on boys under the age of six months were claimed on Medicare in 2008 alone.<sup>3</sup> The number of claims in a single year moved even closer to twenty thousand in 2009.<sup>4</sup> Medicare Australia contributed over 1.9 million dollars for circumcisions performed on boys under the age of six months in 2009.<sup>5</sup> Circumcision exists at the crossroads of religion, tradition, human rights, health, harm, and several complex conceptual and philosophical matters, including autonomy and paternalism. The proper mode of its legal regulation is one of many divisive issues in 21st century Australia. However, there has never been significant legal action relating to, or legislative regulation of male circumcision anywhere in Australia. There is no governing Circumcision Act. There has never been a circumcision test case. Uncertainties abound in the application of the general law to circumcision, and existing legal analysis suffers from the partisanship, idealism and perfunctory examination common to literature concerning conflict ridden topics. This thesis, adopting the perspective of an implementation minded law reformer, critically analyses the application of the current law to non-therapeutic male circumcision, and recommends reform to improve the legal regulation of male circumcision in Australia.

Australia's criminal and civil laws were not framed with male circumcision in mind. It is not immediately clear how the general criminal and civil law apply to a harmful and irreversible procedure which is performed, in the vast majority of cases,<sup>6</sup> for non-therapeutic reasons without the prior consent of the person operated upon. Even preliminary legal matters, such as the

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<sup>1</sup> Robert Darby, 'A Source of Serious Mischief: The Demonisation of the Foreskin and the Rise of Preventative Circumcision in Australia' in George Denniston, Frederick Hodges and Marilyn Milos (eds), *Understanding Circumcision: A Multidisciplinary Response to a Multi-dimensional Problem* (2001) 153, 159.

<sup>2</sup> Most anthropological articles on genital modification in Indigenous Communities focus on the practice of subincision rather than circumcision simpliciter, see for example: John Cawte, N Djagamara and Murray Barret, 'The Meaning of Subincision of the Urethra to Aboriginal Australians' (1966) 39 *British Journal of Medical Psychology* 245; John Morrison, 'The Origins of the Practices of Circumcision and Subincision Among the Australian Aborigines' (1967) *Medical Journal of Australia* 125.

<sup>3</sup> In 2008, 19,656 claims against Medicare were made for the circumcision of children under six months of age. See Medicare item 30653 processed from January 2008 to December 2008: Medicare Australia, *Medicare Item Reports* (2010) <[https://www.medicareaustralia.gov.au/statistics/mbs\\_item.shtml](https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml)> at 20 October 2010.

<sup>4</sup> In 2009, 19,981 claims against Medicare were made for the circumcision of children under six months of age. See: Medicare item 30653 processed from January 2009 to December 2009: Medicare Australia, *Medicare Item Reports* (2010) <[https://www.medicareaustralia.gov.au/statistics/mbs\\_item.shtml](https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml)> at 20 October 2010.

<sup>5</sup> Medicare Australia contributed \$1,912,907 for circumcisions performed on boys under the age of six months in 2009. See: Medicare item 30653 processed from January 2009 to December 2009: Medicare Australia, *Medicare Item Reports* (2011) <[https://www.medicareaustralia.gov.au/statistics/mbs\\_item.shtml](https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml)> at 14 February 2011.

<sup>6</sup> Claims for the circumcision of children less than six months of age constituted 18,756 out of 25,903 total circumcisions claimed on Medicare in 2007. Claims for the circumcision of children less than six months of age constituted 19,656 claims out of 26,826 total circumcisions claimed on Medicare in 2008. See Medicare items 30653, 30656, 30659 and 30660 processed from January 2007 to December 2007, and January 2008 to December 2008: Medicare Australia, *Medicare Item Reports* (2010) <[https://www.medicareaustralia.gov.au/statistics/mbs\\_item.shtml](https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml)> at 20 October 2010.



circumstances of a lawful authorisation, are clouded in uncertainty. Currently, those who perform, assist in, or instigate a circumcision, or who promote or advertise their services as a circumciser, do so without knowing the full extent to which they are protected from civil and criminal liability. Authoritative clarification of the law is much needed and long overdue. Health, human rights, legal and religious organisations have all previously pressed for this clarification.<sup>7</sup> The shadow cast by the existing uncertainty provides cover for questionable acts, and ominously follows those who may be acting commendably.

Clarification of the law is yet to come from scholars. Overseas legal commentary has not considered the application of Australia's state and territory law to circumcision in detail. Australian legal commentary did not begin to address the application of Australia's laws to circumcision until the very end of the twentieth century. The 1993 Queensland Law Reform Commission's paper on male circumcision, the most often cited Australian legal commentary in the area, is now over fifteen years old, Queensland focused, and was never intended to be Australia's primary circumcision legal reference.<sup>8</sup> Les Haberfield's and David Richard's commentaries, published later in the 1990s, now themselves dated, were never intended to offer more than a cursory review of Australian law.<sup>9</sup> The Tasmanian Law Reform Institute's 2009 issues paper, though thorough in its examination of the application of Tasmanian law to male circumcision, is limited as an Australian legal reference by its Tasmanian focus.<sup>10</sup>

The body of commentary and literature on circumcision also suffers from partiality, idealism, and unsophisticated legal analysis. Many widely disseminated commentaries brush aside competing and equally open interpretations of law, significant evidential problems, key jurisdictional differences, and detailed problems of law to create the appearance of certainty where certainty does not in fact exist. Furthermore, regulatory reform, either implicitly or explicitly, is usually the main focus of legal commentary on circumcision. Very few legal commentaries are presented in a purely explanatory fashion devoid of normative argument. Most passionately argue for either a change in the current law, or, usually following some questionable interpretation of the existing law, a significant change in how the current law is enforced.<sup>11</sup> Unfortunately, very little pragmatism, or political and legal acumen is shown in the proposals presented in these commentaries. They are proposals for a vacuum, or a society in consensus, not for modern Australia.

The purpose of this thesis is to propose law reform to improve the regulation of male circumcision in Australia. It seeks to achieve this purpose in four stages: first, by explicitly

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<sup>7</sup> See for example: George Goldsteen, 'The Argument Over Circumcision of Babies', *The Examiner* (Tasmania) 21 August 2009, 21 (a religious position); Jonathon Bedloe (Department of Health and Human Services, Tasmania), *Submission in Response to the Tasmanian Law Reform Institute's Issues Paper No. 14* (2009) (a health position); Tasmanian Law Reform Institute, *Non-Therapeutic Male Circumcision*, Issues Paper No 14 (2009) (a law reform position).

<sup>8</sup> Queensland Law Reform Commission, *Circumcision of Male Infants*, Miscellaneous Paper No 6 (1993).

<sup>9</sup> Les Haberfield, 'The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues' (1997) 23 *Monash University Law Review* 92; Les Haberfield, 'Informed Consent and Infant Male Circumcision' (Paper presented at the Australasian Law Teachers Association Conference, Sydney, 3 October 1997); Les Haberfield, 'Responding to Male Circumcision: Medical or Ritual' (1997) 4 *Journal of Law and Medicine* 379; David Richard, 'Male Circumcision: Medical or Ritual' (1996) 3 *Journal of Law and Medicine* 371.

<sup>10</sup> Tasmanian Law Reform Institute, *Non-Therapeutic Male Circumcision*, Issues Paper No 14 (2009). The author of this thesis also prepared the Tasmanian Law Reform Institute's issues paper. Whilst the structure of this thesis and the issues paper are somewhat similar, this thesis is significantly more comprehensive than the Tasmanian Law Reform Institute's issues paper.

<sup>11</sup> For an example of where both arguments are made in the alternative see: Christopher Price, *Male Circumcision: A Legal Affront* [Submission in response to the Law Commission for England and Wales Consultation Paper Number 139] (1996).

adopting an analytical approach grounded in Australia's legal and political realities; second, by thoroughly examining the probable application of the current law to circumcision; third, by critically analysing the current legal regulation of circumcision; and fourth, by presenting a law reform proposal to improve the legal regulation of circumcision in Australia based upon this analysis.

The remainder of this introductory chapter is divided into three sections. The first defines the scope and key terms of this thesis. The second provides an outline of its methodology and structure. The third introduces the overarching analytical perspective.

## 1.1 Scope and Key Terms

This thesis is primarily concerned with the application of the law in Australia to non-therapeutic male circumcision. However, it also considers the application of the law in Australia to other non-therapeutic male genital modifications, some of which are known to still be of considerable significance for cultural reasons in some Indigenous Australian communities.

This thesis addresses non-therapeutic male genital modifications only. Legislation prohibiting all forms of female circumcision, widely known as female genital mutilation, already operates in each state and territory of Australia.<sup>12</sup> References to circumcision in this thesis, unless otherwise indicated, refer exclusively to male circumcision.

Circumcision is defined as a genital modification involving at least a partial excision of the male foreskin. The foreskin includes all the flesh covering and extending beyond the glans penis (when it is present).<sup>13</sup> A reference to circumcision in the text, unless otherwise indicated, refers to a circumcision procedure which does not involve the deliberate alteration of either the glans or the internal structure of the penis. The discussion of circumcision in this thesis will also, and is intended to, extend to other forms of non-therapeutic male genital modification unless the text or context suggests otherwise. The term genital modification is used in this thesis to refer expressly to both circumcision and other procedures, which involve the deliberate alteration of the glans, or the internal structure of the penis, and may also involve a circumcision.

A circumciser is anyone, however qualified or trained, who performs a circumcision. A genital modifier is anyone, however qualified or trained, who performs a genital modification. These expansive definitions are used in this thesis in recognition of the variety of people (from highly trained and experienced medical practitioners, to traditional practitioners and laypersons) who have attempted, or may attempt in future, to perform a circumcision or any other genital modification in Australia. The discussion of circumcisers in this thesis will also, and is intended to, extend to other genital modifiers unless the text or context suggests otherwise. Distinctions between those who perform circumcision simpliciter or genital modifications will be made within the text when the need arises.

Much of the discussion in this thesis focuses upon the circumcision of minors. The majority of circumcisions in Australia are performed on minors (of which infants form the highest

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<sup>12</sup> *Crimes Act 1900* (ACT) s 74; *Crimes Act 1900* (NSW) s 45; *Criminal Code 1983* (NT) s 186B; *Criminal Code 1899* (QLD) s 323A; *Criminal Law Consolidation Act 1935* (SA) s 33A; *Criminal Code Act 1924* (TAS) s 178A; *Crimes Act 1958* (Vic) s 32; *Criminal Code Act 1913* (WA) s 306.

<sup>13</sup> The purposes of this thesis do not require an overly technical definition of circumcision or the foreskin. For a detailed discussion of the anatomy of the foreskin see: Steve Scott, 'The Anatomy and Physiology of the Human Prepuce' in George Denniston, Frederick Hodges and Marilyn Milos (eds), *Male and Female Circumcision: Medical Legal and Ethical Considerations in Paediatric Practice* (1999) 9.

percentage),<sup>14</sup> and most of the uncertainty in the law is in that area. However, it is difficult to examine how the law applies to minors before the application of the law to adults is considered. Accordingly, legal analysis of the circumcision of adults is included as it increases the comprehensiveness of the thesis without adding to its complexity. Care will be taken to indicate within the text whether the relevant discussion relates to adults, or minors who can provide a competent legal consent (capable minors), or minors who are incapable of providing a competent legal consent by virtue of their immature age (incapable minors). The circumcision of intersexual or mentally disabled people is not specifically addressed.

A reference to circumcision, or any other form of genital modification, unless otherwise indicated, is a reference to non-therapeutic circumcision, or non-therapeutic genital modification. Non-therapeutic is given its ordinary meaning. A circumcision is non-therapeutic if it is performed for any reason other than remedying or treating an existing disease, illness or deformity of the body. Thus, a circumcision for prophylactic reasons, one which is performed for the purpose of preventing or reducing the likelihood of future disease, illness or deformity of the body, is a non-therapeutic circumcision.<sup>15</sup>

## 1.2 Methodology and Structure

There are three parts to this thesis, namely:

- I. Background (chapters one to two)
- II. Analysis (chapters three to seven)
- III. Recommendations for Reform (chapter eight)

This section provides a succinct chapter by chapter outline of each part.

### Part I: Background

Part I presents the analytical framework and background information driving the argument.

Chapter one introduces the analytical perspective adopted. All laws are informed, sometimes explicitly, sometimes implicitly, by a particular perspective. Political and legal realities exclude the likelihood of some of the more absolutist and idealistic regulatory options ever being legislated. The analytical perspective utilised is that of an implementation minded law reformer. This chapter concludes by detailing this perspective.

Chapter two provides the background information informing the analytical perspective presented in chapter one. It notes the factual information, arguments and conceptual influences weighing upon an implementation minded law reformer considering circumcision law reform. The chapter identifies six main conceptual influences: religion, health, ethnicity, social tradition, autonomy

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<sup>14</sup> Claims for the circumcision of children less than six months of age constituted 18,756 out of 25,903 total circumcisions claimed on Medicare in 2007. Claims for the circumcision of children less than six months of age constituted 19,656 claims out of 26,826 total circumcisions claimed on Medicare in 2008. See Medicare items 30653, 30656, 30659 and 30660 processed from January 2007 to December 2007, and January 2008 to December 2008: Medicare Australia, *Medicare Item Reports* (2010) <[https://www.medicareaustralia.gov.au/statistics/mbs\\_item.shtml](https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml)> at 20 October 2010.

<sup>15</sup> The medical community recognises treatment to prevent the likely recurrence of a person's negative health condition as therapeutic treatment. This thesis is also inclined to accept such treatment as therapeutic treatment.

and naturalism. The conceptual influences discussed in chapter two are used to analyse and assess the current law in Part II, and to inform the law reform proposed in Part III.

## **Part II: Analysis**

Part II begins with the difficult task of delineating the probable application of the law to circumcision in both Australia, and, for sake of comparison, the overseas jurisdictions with specialised circumcision regulation. It then proceeds to analyse this law critically with the analytical framework presented in Part I. Each chapter in Part II (chapters 3 to 7) addresses a different area of law.

Chapter three reviews the complex and uncertain application of Australia's criminal laws to male circumcision. Australia does not have a uniform system of criminal law. Australia's six states and two major mainland territories operate under separate systems of criminal law. The chapter analyses the criminal offences, and defences to these offences, which are most relevant to the circumstances of a non-therapeutic male circumcision. By doing so, chapter three provides the first thorough overview of the criminal liability of circumcisers, and those who authorise, instigate, assist with or encourage the performance of a circumcision in each state and mainland territory of Australia.

Chapter four examines the application of family law and the tort of battery to circumcision. This area of law is governed by an overlapping mix of federal and state legislation and the common law. The chapter identifies as far as possible the current requirements of an effective authorisation to perform a circumcision on an adult, a capable minor, and an incapable minor, in each state and territory in Australia. The legal analysis in chapter four concludes by addressing how the circumcision of a minor may be challenged in court, and who may bring such a challenge.

Chapter five presents a brief discussion of some of the more contentious potential applications of private law to circumcision. The chapter illustrates the application of private law to the main areas of a circumciser's practice, namely the: advertising of their services, provision of information to a person authorising them to perform a circumcision, performance of the circumcision, and, use or sale of the excised foreskin. The chapter also discusses the effect of various state and territory limitation statutes on the availability of an action for a person harmed by a circumcision, and the illegality defence as a potential way for a circumciser to avoid liability for a wrongful circumcision that is illegal under the criminal law.

Chapter six focuses on human rights law. Australia's human rights regime is patchwork in its coverage and enforceability. Australia does not have a federal human rights Act. Only two of Australia's state and territory legal jurisdictions have enacted human rights legislation, and Australia has not implemented into domestic law all of the international human rights treaties it has ratified. The chapter begins by analysing the nature of Australia's human rights obligations. It then discusses the legal ramifications of a human rights violation, and of a law which is inconsistent with human rights. It goes on to identify and discuss the human rights obligations relevant to circumcision. The chapter concludes by critically analysing the role of human rights law in the regulation of circumcision.

Chapter seven describes and analyses the legal regulation of male circumcision in selected foreign jurisdictions. This discussion provides a comparative law aspect to the analysis by reviewing the regimes in Sweden, South Africa and three of South Africa's provinces, and the United States, dealing with specialised circumcision legal regulation.

### Part III: Recommendations for Reform

The final part of this thesis, which builds upon the analytical framework identified in Part I and the analysis in Part II, proposes and justifies law reform to improve the legal regulation of circumcision in Australia.

Chapter eight begins by briefly reiterating the key lessons which were learnt from the first two Parts. It then identifies some of the potential conceptual, legal and political limitations which have an impact upon the implementation of circumcision law reform before presenting and justifying the regulatory regime proposed. The chapter concludes by identifying the main contributions of this thesis and suggesting areas that may benefit from further research.

## 1.3 A Law Reform Approach

This thesis takes the analytical perspective of an implementation minded law reformer. This perspective recognises and respects the strongly held views on circumcision in a culturally diverse, pluralistic and democratically organised society such as Australia. It is concerned with formulating reforms that are practical and designed for ready implementation by Australia's lawmakers.<sup>16</sup> The perspective is one which aims to devise a legislative regulatory regime which, whilst seeking greater legal certainty, reconciles and accommodates the many divergent views on circumcision in Australia so as to prevent:<sup>17</sup>

‘...disputes and conflicts from becoming violent and damaging by containing them within a framework of principles that all or most can accept’.

This hypothetical law reformer supports the politics of toleration, compromise and *modus vivendi* agreement in order to enhance the prospects of the implementation and broad societal acceptance of the reforms recommended.

The aim throughout is to find practical solutions to the genuine problems with the current legal regulation of circumcision. The defining feature of the analytical perspective selected is its pragmatism. The perspective eschews idealism, absolutism and unsubstantiated conviction in both its statement of the deficiencies in the law, and in the reforms it proposes. It attempts this by discerning the deficiencies in the law from a broad survey of actual stakeholder grievances, and by proposing reforms which are evidence based and crafted to be politically and legally viable.

The following chapter identifies the factual information, central arguments, and key conceptual influences which weigh upon such a law reformer. The analytical perspective identified in this chapter, and the conceptual influences identified in chapter two, are used to inform the critical analysis of the law presented in Part II and beginning in chapter three.

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<sup>16</sup> For a discussion of implementation, and the nature of an implementation minded law reformer, see: Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005) ch 2, 15.

<sup>17</sup> George Crowder, *Liberalism and Value Pluralism* (2002) 98-99.

## Chapter 2

# Key Conceptual Influences

Law reform is only persuasive when it is evidence based and grounded in political and legal reality, and a law reformer is only as good as their understanding of the conceptual influences relevant to their decision making. This chapter introduces the main facts, arguments, and influences which weigh upon an implementation minded law reformer considering circumcision law reform.<sup>1</sup> The information presented contextualises the analysis of the law in Part II, and informs the law reform proposed in Part III. The discussion addresses six key conceptual influences: religion, health, ethnicity, social tradition, autonomy, and naturalism.<sup>2</sup> Each of these is analysed in terms of its history, the major concerns of its proponents and its legal and political influence.<sup>3</sup>

## 2.1 Religion

Circumcision is inexorably tied to religion. Judaism, Christianity and Islam (the Abrahamic faiths) have a long historical relationship with circumcision. Circumcision has been a defining mark of belief for members of the Jewish faith for millennia, the Christian bible contains an account of Jesus' circumcision,<sup>4</sup> and Muslims have long been humanity's single largest circumcising subgroup.<sup>5</sup> Approximately two thirds of all males alive and circumcised today were circumcised for religious reasons.<sup>6</sup> This section begins by providing a condensed discussion of the importance and historical significance of circumcision to Jews, Christians, and Muslims in Australia.

### Background: Religion

Judaism is the oldest circumcising Abrahamic faith in existence today. Circumcision has been considered a part of Judaism since the moment that Abraham, the patriarch of Judaism, Christianity and Islam, circumcised himself. According to the *Torah*, the most important of the Jewish holy books, Abraham circumcised himself as part of a covenant with God.<sup>7</sup> For fulfilling the covenant, Abraham was promised that he would be exceedingly fruitful, be given possession

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<sup>1</sup> For an excellent discussion of the interaction between proponents of the conceptual influences discussed in this chapter see: Laura Carpenter, 'Influencing Health Debates Through Letters to the Editor: The Case of Male Circumcision' (2009) 19 *Qualitative Health Research* 519. This article is essential reading for a person who wishes to understand how proponents in the circumcision debate argue, and why they argue the way they do.

<sup>2</sup> The six key conceptual influences described are believed by the author to represent the field of conceptual influences on proponents in the debate over the merit of circumcision. The categories were shaped by the author after extensive research into the debate over the merits of circumcision.

<sup>3</sup> The key conceptual influences described are believed by the author to represent the field of conceptual influences on proponents in the debate over the merit of circumcision. The categories were shaped by the author after extensive research into the debate over the merits of circumcision.

<sup>4</sup> Luke 2:21.

<sup>5</sup> World Health Organization, *Male Circumcision: Global Trends and Determinants of Prevalence, Safety and Acceptability* (2007) 1.

<sup>6</sup> *Ibid.*

<sup>7</sup> Genesis 17:1-27.

of the land of Canaan,<sup>8</sup> and be made a father of a multitude of nations and a line of kings.<sup>9</sup> Abraham's side of the covenant is contained within the book of Genesis:<sup>10</sup>

And ye shall be circumcised in the flesh of your foreskin; and it shall be a token of a covenant betwixt Me and you; And he that is eight days old shall be circumcised among you, every male throughout your generations, he that is born in the house, or bought with money of any foreigner, that is not of thy seed; he that is born in thy house, and he that is bought with thy money, must needs be circumcised; and My covenant shall be in your flesh for an everlasting covenant.

This text is the basis of the continuing Jewish tradition of circumcising infant boys on the eighth day of their life.<sup>11</sup> The practice of circumcision is almost universally regarded by Jews as a direct commandment from God, and is generally considered to be a requirement of full participation in the Jewish faith.<sup>12</sup>

Christianity is the second oldest Abrahamic faith with an historical link to religiously motivated circumcision. Christianity's main religious text, the *New Testament*, makes explicit reference to the infant circumcision of the Christian's messiah Jesus. According to the *New Testament*, Jesus, born sometime before 1CE,<sup>13</sup> was circumcised according to Jewish law.<sup>14</sup> Most early Christians were circumcised as children according to Jewish law. However, there is little evidence that Jesus ever explicitly endorsed circumcision, and Christianity is, at least for the most part, no longer a religion which universally promotes circumcision for religious reasons. Christianity's split with circumcision began when Christian apostles and community leaders met in Jerusalem around 50CE to discuss whether converting gentiles ought to be required to undergo ritual circumcision. The participating Christians concluded that circumcision was not a requirement of faith for new converts to the religion.<sup>15</sup> The apostle Paul in particular, himself circumcised as a Jew, vehemently opposed the suggestion that converting gentiles ought to be circumcised. In some versions of the *New Testament* Paul is even said to have written:<sup>16</sup>

As for those agitators [who supported the circumcision of gentiles converting to Christianity], I wish they would go the whole way and emasculate themselves!

Christian sects today, with few exceptions (that include some particular Coptic, and other African orthodox Christian churches),<sup>17</sup> do not mandate, or even tacitly support the practice of

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<sup>8</sup> The Land of Canaan is an area that includes all, or parts of, modern day Israel (including the Palestinian territories), Lebanon, Jordan, Egypt and Syria.

<sup>9</sup> Genesis 17:4-8.

<sup>10</sup> Genesis 17:11-13.

<sup>11</sup> See also: Leviticus 12:3.

<sup>12</sup> It should be noted that there are people, and some groups, who identify themselves as Jewish that do not practise circumcision, see for example: Jews Against Circumcision, *Jews Against Circumcision Home Page* (2009) <<http://www.jewsagainstcircumcision.org>> at 20 October 2010; Jewish Resource Center, *Jewish Resource Center Home Page* (2009) <<http://www.jewishcircumcision.org>> at 20 October 2010.

<sup>13</sup> For a discussion of the probable birth date of Jesus, placing his birth between 7-5BCE, see: Robert Stein, *Jesus the Messiah* (1996) 52-56.

<sup>14</sup> Luke 2:21.

<sup>15</sup> Acts 15:1-41.

<sup>16</sup> Galatians 5:12 (*New International Bible*).

<sup>17</sup> See: Margo DeMello, *Encyclopedia of Body Adornment* (2007) 66; Christine Mattson et al, 'Acceptability of Male Circumcision and Predictors of Circumcision Preference Among Men and Women in Nyanza Province, Kenya' (2005) 17 *AIDS Care* 182, 185. It is worth noting that circumcising infants is not, or at least did not necessarily begin as, a strictly religious practice for Coptic Christians, and, was not, and is still not, universally accepted as desirable for religious reasons under that faith, see: Edward Lane, *Manners and Customs of the Modern Egyptians* (1860) 535-536; Adrian Fortescue, *Lesser Eastern Churches* (2001) 279; Sami Abu-Sahlieh, 'Male

circumcision for religious reasons. Very few Christians are circumcised for strictly religious reasons. Some Christian sects denounce circumcision, however, most Christian sects do not denounce the practice, and most, whilst not supporting it for religious reasons, are neutral or non-committal in their stance on circumcision.<sup>18</sup>

Circumcision is incorporated into Islam, the most recently established of the three main Abrahamic faiths, through two avenues: references of reverence to the life and practices of Abraham in Islamic holy texts, and the *Hadith* (the oral traditions of the words and deeds of Islam's final and most important prophet Muhammad).<sup>19</sup> Circumcision is not mentioned in the Islamic holy book the *Koran* (*Qur'an*). Muhammad was born in 570CE.<sup>20</sup> There are conflicting reports as to when, and if, he was circumcised, and what his precise views as to male circumcision were.<sup>21</sup> However, being circumcised is widely considered by Muslims to be a part of obtaining, or, perhaps more technically, reverting to, *fitra*. *Fitra* is a concept which can be loosely described as a preferred 'natural' state of being. Most, but not all Muslims are circumcised. Nearly all Muslims who are circumcised are circumcised prior to reaching adulthood, and most are circumcised prior to the full onset of puberty. Most Muslim scholars regard circumcision as a highly commendable, but not obligatory, act. However, there are some Islamic scholars who consider circumcision to be an obligation to be performed prior to full conversion to, and participation in, the Muslim faith.<sup>22</sup>

### Concerns: Religion

Proponents of circumcision for religious reasons are understandably passionate in their cause. Religious Australians will be very reluctant to abandon a practice they believe to be commanded or commended by their God. The prohibition of circumcision would be considered absolutely unacceptable by the vast majority of proponents of religious circumcision.

Furthermore, Jews, and the few Christians who support circumcision for religious reasons, will only be likely to accept a circumcision regulatory regime that recognises the lawfulness of circumcising infant children, at least when the children are children of religious parents who wish their child to be circumcised for religious reasons. Muslim sects will also argue for the lawfulness of circumcising children of religious parents for religious reasons.

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Circumcision/Female Circumcision: Is There Any Difference' in Chantal Zabus (ed), *Fearful Symmetries: Essays and Testimonies Around Excision and Circumcision* (2009) 2, 14.

<sup>18</sup> Reathe Rain-taljaard et al, 'Potential for an Intervention Based on Male Circumcision in A South African Town With High Levels of HIV Infection' (2003) 15 *AIDS Care* 315, 323. The Catholic Church once condemned circumcising: Pope Eugenius IV, *Bull of Union with the Copts* (1442). The Catholic Church's position is less forcefully stated and clear now, see: Petrina Fadel, 'Respect for Bodily Integrity: A Catholic Perspective on Circumcision in Catholic Hospitals' (2003) 3 *American Journal of Bioethics* 1f. See also: Catholic Church, *Catechism of the Catholic Church* (2002) [2297].

<sup>19</sup> David Gollaher, *Circumcision: A History of the World's Most Controversial Surgery* (2000) 44-52. For several possible interpretations of Islamic law on male circumcision see: Sami Abu-Sahlieh, 'Jehovah, His Cousin Allah, and Sexual Mutilations' in George Denniston and Marilyn Milos (eds), *Sexual Mutilations: A Human Tragedy* (1997) 41.

<sup>20</sup> David Gollaher, above n 17, 44.

<sup>21</sup> Sami Abu-Salieh, 'Muslim's Genitalia in the Hands of the Clergy: Religious Arguments about Male and Female Circumcision' in George Denniston, Frederick Hodges and Marilyn Milos (eds), *Male and Female Circumcision: Medical Legal and Ethical Considerations in Paediatric Practice* (1999) 131.

<sup>22</sup> For a general discussion on circumcision in Islam, see: Clifford Bosworth et al (eds), *The Encyclopaedia of Islam* (1976) 20-22; Syed Ali Anwar Naqvi et al, 'Religious Circumcision: A Muslim View' (1999) 83 *British Journal of Urology International* 13.



Jewish circumcisions, as well as some other religiously motivated circumcisions, are almost always performed as part of a larger religious ceremony. A valid Jewish circumcision must meet certain religiously mandated procedural requirements, including the use of a *Mohel* (a religiously trained circumciser) and the utilisation of special instruments and techniques. Members of sects of other faiths with procedural requirements for a religiously valid circumcision may have similar concerns. Most members of these faiths will be reluctant to accept a regime which does not legally protect these requirements. However, not all circumcising religious faiths value particular circumcising methods. For example, whilst the state of being circumcised is valuable in Islam, the act of circumcising itself, and the mode of its performance, is not generally regarded as being of spiritual importance.<sup>23</sup>

Proponents of religious circumcision can probably be expected to willingly accept some regulation of their circumcising practices, including perhaps: the establishment of some training requirements for circumcisers, increased monitoring, and perhaps some limits upon which instruments and techniques may be utilised to perform the procedure.

### **Influence: Religion**

The precise number of people in Australia who support circumcision because they believe it to be commended or commanded by the faith they identify with is unknown. The 2006 census identified 88,826 Jews, 340,390 Muslims, 19,928 Coptic Orthodox Christians and 1,705 Ethiopian Orthodox Christians in Australia.<sup>24</sup> These faiths all commend, mandate, or are at least often taken as tacitly supporting, circumcision for religious reasons. This means that at the last census at least 450,849 Australians (more than 2% of the population at the time) identified themselves with a religious faith associated with religiously motivated circumcision.<sup>25</sup>

Political and legal influences supporting religiously motivated circumcision will weigh heavily upon a law reformer. Australia has a long history of religious toleration, and many Australians recognise merit in protecting a significant sphere of freedom for religiously motivated practices. Some Australians will accept, and may even support, some religiously motivated circumcisions on the basis of their belief in the merit of religious tolerance. A sphere of religious freedom is also legally protected in international and domestic human rights law (see discussion from page 120). Courts in foreign jurisdictions have previously held religious circumcision to be, at least when performed in safe conditions with uncontested patient or parental consent, a practice protected by human rights law.<sup>26</sup> Whether religious circumcision is protected by human rights law is discussed in detail in chapter six.

Negative political repercussions are predictable domestically and internationally if Australia's lawmakers prohibit or significantly restrict circumcisions performed with patient or parental consent and for religious reasons. Independent law reform institutions in Queensland and Tasmania, which have each previously released a paper discussing the potential need for law reform to the regulation of circumcision, both received submissions from religious groups

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<sup>23</sup> For a discussion of the significance of ritual in circumcising in Islam and in Judaism see: David Biale, *Blood and Belief: The Circulation of a Symbol between Jews and Christians* (2008); Margherita Brusa and Y Micheal Barilan, 'Cultural Circumcision in EU Public Hospitals - An Ethical Discussion' (2009) 23 *Bioethics* 470.

<sup>24</sup> Australian Bureau of Statistics, *2006 Census Table: 20680-Religious Affiliation (full classification list) by Sex – Australia* (2007).

<sup>25</sup> *Ibid.*

<sup>26</sup> KKO:2008:93 (Finland).

implored them to protect their circumcising tradition.<sup>27</sup> Proposals to regulate circumcision restrictively in foreign jurisdictions have been criticised in the past by proponents of religious circumcision.<sup>28</sup> The cultivation of Australia's image internationally as a pluralistic and religiously tolerant society may be undermined should a parliament in Australia choose to legislatively restrict important aspects of religious circumcision.

## 2.2 Health

It is impossible to broach the health aspect of circumcision without raising controversy. Very few facts in the field of medical knowledge on circumcision are truly undisputed, or incapable of considerably conflicting interpretation as to their significance. For example, in 2004 a jointly issued policy statement on circumcision by the Royal Australasian College of Physicians (RACP), the Australian Association of Paediatric Surgeons, the New Zealand Society of Paediatric Surgeons, the Urological Society of Australasia, the Royal Australasian College of Surgeons, and the Paediatric Society of New Zealand concluded that, 'there is no evidence of benefit outweighing harm for circumcision as a routine procedure in the neonate'.<sup>29</sup> A review of that authoritative joint statement, co-authored by Xavier Castellsagué, one of the leading experts in the field of cervical cancer and the human papillomavirus (HPV), concluded that the statement was 'misleading, inaccurate and, in places, incorrect...' and that it amounted to 'thinly disguised propaganda'.<sup>30</sup> That review, including its strong accusations, has in turn been peer reviewed and had aspects of it criticised.<sup>31</sup>

The RACP has since released a new circumcision policy statement. The length of time the RACP took to release this statement, exceeding three years, and the unusual circumstances surrounding the retraction of an interim RACP statement, which was released in 2009 and recommended against circumcising infants routinely, testify to the complexity of the public health debate surrounding circumcision.<sup>32</sup> The new statement reaffirms the conclusion of the 2004 statement, and the 2009 interim statement, that the prophylactic effect associated with circumcision does not warrant the routine circumcision of male infants in Australia and New Zealand.<sup>33</sup>

This section identifies the background medical and health information about circumcision which is accepted by and which shapes the content of this thesis.<sup>34</sup> The first subsection endeavours to

<sup>27</sup> Queensland Law Reform Commission, *Circumcision of Male Infants*, Miscellaneous Paper No 6 (1993) ch 2; Tasmanian Law Reform Institute, *Non-Therapeutic Male Circumcision*, Issues Paper No 14 (2009).

<sup>28</sup> See: Yngve Hofvander, 'New Law on Male Circumcision in Sweden' (2002) 359 *The Lancet* 630.

<sup>29</sup> Royal Australasian College of Physicians, *Position Statement on Circumcision* (2004).

<sup>29</sup> Royal Australasian College of Physicians, *Position Statement on Circumcision* (2004).

<sup>30</sup> Brian Morris et al, 'RACP's Policy Statement on Infant Male Circumcision is Ill-Conceived' (2006) 30 *Australian and New Zealand Journal of Public Health* 16, 20.

<sup>31</sup> Juliet Richters, 'Critical Commentary on RACP Policy Statement on Infant Male Circumcision: A Response' (2006) 30 *Australian and New Zealand Journal of Public Health* 22.

<sup>32</sup> The interim statement, released in August of 2009 on the RACP website, concluded that: 'After extensive review of the literature the RACP does not recommend that routine circumcision in infancy be performed'. See: Royal Australasian College of Physicians, *Current College Position on Circumcision* (2009). The statement was retracted within a week of being posted on the RACP website. The RACP has indicated that '...the interim statement was placed on the College's website prior to the full position statement being revised and finalised through the College's processes', and that 'Although the interim statement was in line with the evidence and recommendations contained in the finalised position statement, it was felt that the interim statement should be removed awaiting the full position statement being included on the web site.' Email from Engy Henein (Administrative Assistant, Paediatrics & Child Health Division RACP) to Warwick Marshall, 15 February 2011.

<sup>33</sup> Royal Australasian College of Physicians, *Circumcision of Infant Males* (2010) 5.

<sup>34</sup> There is consensus in the medical community that circumcision is a valuable option to have available for the treatment of many conditions when they exist, including: paraphimosis; recurring balanitis; pathological phimosis

succinctly present an accurate picture of the relationship of circumcision to individual and public health in Australia. The second subsection identifies how this information is being used by proponents in the circumcision debate. The third subsection discusses the potential of the various arguments in the circumcision health debate to influence a law reformer considering circumcision regulatory reform.

## Background: Health

Research has produced evidence to suggest that circumcision may reduce the likelihood of healthy men contracting a wide array of different diseases and infections. Much of this research is subject to criticism of varying strength, or is contradicted by conflicting research of varying strength.<sup>35</sup> Research on the potential relative reduction in the likelihood of a circumcised man contracting a particular illness compared to an uncircumcised man is strongest for: human immunodeficiency virus (HIV) transmitted from a woman to a man via vaginal intercourse;<sup>36</sup> human papillomavirus (HPV) transmitted from a woman to a man via vaginal intercourse;<sup>37</sup> urinary tract infection (UTI);<sup>38</sup> and penile cancer.<sup>39</sup> There is also evidence which suggests that circumcision may reduce the likelihood of male to female sexual transmission of HPV (a potential cause of cervical cancer).<sup>40</sup>

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(usually caused by Balanitis Xerotica Obliterans) and even natural phimosis if it causes considerable discomfort or difficulty to a person. This thesis, and this section, is only concerned with circumcisions performed for non-therapeutic reasons.

- <sup>35</sup> For penile cancer see: Ronald Poland, 'The Question of Routine Neonatal Circumcision' (1990) 22 *The New England Journal of Medicine* 1312; American Cancer Society, *Detailed Guide: Penile Cancer* (2008). For HIV see for example: Gary Dowsett and Murray Couch, 'Male Circumcision and HIV Prevention: Is There Really Enough of the Right Kind of Evidence' (2007) 15 *Reproductive Health Matters* 33; Edward Mills and Nandi Siegfried 'Cautious Optimism for New HIV/AIDS Prevention Strategies' (2006) 368 *The Lancet* 1236; John Talbott, 'Size Matters: The Number of Prostitutes and the Global HIV/AIDS Pandemic' (2007) 2 *PloS ONE* 543. For UTI's see for example: American Academy of Pediatrics, 'Circumcision Policy Statement' (1999) 103 *Pediatrics* 686; Jennifer Vines, 'Major Potential Confounder Not Addressed' (2006) 3 *PLoS Med* e63.
- <sup>36</sup> Robert Bailey et al, 'Male Circumcision for HIV Prevention in Young Men in Kisumu, Kenya: A Randomised Controlled Trial' (2007) 369 *The Lancet* 643; Ronald Gray et al, 'Male Circumcision for HIV Prevention in Men in Rakai, Uganda: A Randomised Trial' (2007) 369 *The Lancet* 657; Bertran Auvert et al, 'Randomized, Controlled Intervention Trial of Male Circumcision for Reduction of HIV Infection Risk: The ANRS 1265 Trial' (2005) 2 *PloS Medicine* 1112.
- <sup>37</sup> Xavier Castellsagué et al, 'Male Circumcision, Penile Human Papillomavirus Infection, and Cervical Cancer in Female Partners' (2002) 346 *New England Journal of Medicine* 1105; Bertran Auvert et al, 'Effect of Male Circumcision on the Prevalence of High-Risk Human Papillomavirus in Young Men: Results of a Randomized Controlled Trial Conducted in Orange Farm, South Africa' (2009) 199 *Journal of Infectious Diseases* 14.
- <sup>38</sup> See for example: Davinder Singh-Grewal, Joseph Macdessi and Jonathan Craig, 'Circumcision for the Prevention of Urinary Tract Infection in Boys: A Systematic Review of Randomised Trials and Observational Studies' (2005) 90 *Archives of Disease in Childhood* 853. However, it should be noted that there is evidence in support of the proposition that undergoing a traditional Jewish circumcision significantly increases the chance of a child suffering from a UTI, see: Ori Toker et al, 'A Costly Covenant: Ritual Circumcision and Urinary Tract Infection' (2010) 12 *Israel Medical Association Journal* 262; Dario Prais, Rachel Shoov-Furman and Jacob Amir, 'Is Ritual Circumcision a Risk Factor for Neonatal Urinary Tract Infections?' (2009) 94 *Archives of Disease in Childhood* 191.
- <sup>39</sup> Edgar Schoen et al, 'The Highly Protective Effect of Newborn Circumcision against Invasive Penile Cancer' (2000) 105 *Pediatrics* 36.
- <sup>40</sup> Xavier Castellsagué et al, above n 35; Bertran Auvert et al, 'Effect of Male Circumcision on the Prevalence of High-Risk Human Papillomavirus in Young Men...', above n 35; Ronald Gray et al, 'Male Circumcision Decreases Acquisition and Increases Clearance of High-Risk Human Papillomavirus in HIV-Negative Men: A Randomized Trial in Rakai, Uganda' (2010) 201 *The Journal of Infectious Diseases* 1455.

There is also some evidence for the proposition that circumcision may reduce: the likelihood of HIV being transmitted from a man to a woman via vaginal intercourse;<sup>41</sup> the likelihood of HIV being transmitted from a man to a man via anal intercourse;<sup>42</sup> the likelihood of syphilis being transmitted from a woman to a man via vaginal intercourse;<sup>43</sup> and the likelihood of herpes being transmitted from a woman to a man via vaginal intercourse.<sup>44</sup> However, the strength of the evidence contradicting these four purported prophylactic affects is such that a strong statement for the likelihood of some benefit, or even just neutrality for at least one of the purported effects,<sup>45</sup> cannot be made.<sup>46</sup>

Importantly, circumcision does not provide complete protection from any of the aforementioned conditions. The potential benefit of circumcision is only in the form of a relative reduction of risk. However, the removal of the foreskin does extinguish (or at least quite substantially reduce) the risk of acquiring a number of minor foreskin specific conditions.<sup>47</sup>

Contention surrounds the evidence supporting circumcision's potential benefit to health. Members of the medical and scientific community have expressed concern about potential confounding methodological and sampling problems in some studies. Conflicting studies, and meta-analyses of existing studies, also suggest that circumcision's potential prophylactic benefits may not be as strong or significant as is sometimes claimed.<sup>48</sup> Australian researchers and policy

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<sup>41</sup> For a study suggesting circumcision may have a slight, but not significant, effect of reducing the likelihood of a man passing HIV to a female sexual partner see: Jared Baeten et al, 'Male Circumcision and Risk of Male-to-Female HIV-1 Transmission: A Multinational Prospective Study in African HIV-1-Serodiscordant Couples' (2009) 24 *AIDS* 737.

<sup>42</sup> The protective effect may be limited to insertive partners, for an overview of the relevant studies see: David Templeton, Gregorio Millett and Andrew Grulich, 'Male Circumcision to Reduce the Risk of HIV and Sexually Transmitted Infections Among Men Who Have Sex with Men' (2010) 23 *Current Opinion in Infectious Diseases* 45.

<sup>43</sup> See: Helen Weiss et al, 'Male Circumcision and Risk of Syphilis, Chancroid, and Genital Herpes: A Systematic Review and Meta-Analysis' (2006) 82 *Sexually Transmitted Infections* 101.

<sup>44</sup> See for example: Aaron Tobian et al, 'Male Circumcision for the Prevention of HSV-2 and HPV Infections and Syphilis' (2009) 360 *The New England Journal of Medicine* 1298.

<sup>45</sup> For a study suggesting circumcision may actually have a slight, but not significant, effect of increasing the likelihood of a man passing HIV to a female sexual partner see: Maria Wawer et al, 'Circumcision in HIV-infected Men and its Effect on HIV Transmission to Female Partners in Rakai, Uganda: A Randomized Controlled Trial' (2009) 374 *The Lancet* 229.

<sup>46</sup> For doubts as to the effect of circumcision on the transmission of syphilis see: Aaron Tobian et al, above n 42. For doubts as to the significance of the effect of circumcision on the transmission of HIV from a man to a man via anal intercourse see: David Templeton, Gregorio Millett and Andrew Grulich, above n 40; Gregorio Millett et al, 'Circumcision Status and Risk of HIV and Sexually Transmitted Infections Among Men Who Have Sex With Men: A Meta-analysis' (2008) 300 *Journal of the American Medical Association* 1674. For a study of man to man transmission of HIV via anal intercourse in Australia (which found that circumcision did not significantly reduce the risk of HIV infection generally, but did find circumcision to be associated with a reduction in HIV incidence among men who reported a preference for the insertive role in man to man anal intercourse) see: David Templeton et al, 'Circumcision and Risk of HIV Infection in Australian Homosexual Men' (2009) 23 *AIDS* 2347. For doubts as to the affect of circumcision on the transmission of herpes see: Fujie Xu et al, 'Prevalence of Circumcision and Herpes Simplex Virus Type 2 Infection in Men in the United States: The National Health and Nutrition Examination Survey (NHANES), 1999-2004' (2007) 34 *Sexually Transmitted Diseases* 479. For a meta-analysis that found the affect of circumcision to only be of borderline significance to herpes see: Helen Weiss et al, 'Male Circumcision and Risk of Syphilis...', above n 41.

<sup>47</sup> For example: paraphimosis; balanitis; pathological phimosis (usually caused by Balanitis Xerotica Obliterans); and natural phimosis.

<sup>48</sup> For HIV see for example: Lot de Witte et al, 'Langerin is a Natural Barrier to HIV-1 Transmission by Langerhans Cells' (2007) 13 *Nature Medicine* 367; Edward Mills et al, 'Male Circumcision for the Prevention of Heterosexually Acquired HIV Infection: A Meta-Analysis of Randomized Trials Involving 11050 Men' (2008) 9 *HIV Medicine* 332; Michel Garenne, 'Long-Term Population Effect of Male Circumcision in Generalised HIV Epidemics in Sub-Saharan Africa' (2008) 7 *African Journal of AIDS Research* 1.

makers have questioned the applicability and significance of overseas research to Australia, and to the typical Australian male.<sup>49</sup> However, most of the contention has revolved around the potential significance of the relatively well established scientific findings of a health benefit to public health policy.

The potential significance of circumcision as a public health measure in Australia is limited by: the incomplete nature of the protective effect of circumcision; the easily treatable nature, or low frequency in Australia, of most of the conditions circumcision may reduce the risk of contracting; and the certain and potential costs of circumcision. The debate over whether routine circumcision is capable of having a significant role in reducing the prevalence of HIV in Australia is illustrative of the larger debate over circumcision's potential significance to public health.

Circumcision's claimed prophylactic effect against female to male sexual transmission of HIV is perhaps the most significant and substantiated prophylactic health benefit attributed to circumcision. In 2005, three large and highly acclaimed randomised controlled trials in Africa concluded that circumcised men had an average 42-44%, but perhaps as high as 66%, less (relative) risk of female to male sexual transmission of HIV (i.e. 1.12% of the total circumcised participants in the three trials contracted HIV, compared to 2.54% of the total uncircumcised participants in the three trials).<sup>50</sup> This finding was welcomed in Africa, where there is an extremely high incidence of HIV acquisition from heterosexual sex.<sup>51</sup> In 2007, on the basis of this research, the World Health Organisation (WHO) began promoting adult consensual circumcision as part of a comprehensive strategy to combat the spread of HIV in Africa.<sup>52</sup> Some people have, on the back of these three studies, suggested that circumcision ought to be promoted to reduce the incidence of HIV acquisition in Australia.<sup>53</sup>

The suggested promotion of circumcision in Australia is yet to be endorsed by any HIV/AIDS or medical policy organisation. In 2009 the Australian Federation of AIDS Organisations (AFAO) concluded that the relevant scientific evidence is 'limited, and potentially conflicting', and 'African data on circumcision is context-specific and cannot be extrapolated to the Australian epidemic.'<sup>54</sup> Most Australian health researchers and policy makers, like the AFAO, stress the difference between the Australian HIV epidemic and the epidemic in Africa.<sup>55</sup> In particular, they

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<sup>49</sup> See for example: Caryn Perera et al, 'Safety and Efficacy of Nontherapeutic Male Circumcision: A Systematic Review' (2010) 8 *Annals of Family Medicine* 64; Australian Federation of AIDS Organisations, *Male Circumcision Has no Role in the Australian AIDS Epidemic* (2007); Jason Ferris et al, 'Circumcision in Australia: Further Evidence on Its Effects on Sexual Health and Wellbeing' (2010) 34 *Australian and New Zealand Journal of Public Health* 160.

<sup>50</sup> Robert Bailey et al, 'Male Circumcision for HIV Prevention in Young Men in Kisumu, Kenya...', above n 34; Ronald Gray et al, 'Male Circumcision for HIV Prevention in Men in Rakai, Uganda...', above n 34; Bertran Auvert et al, 'Randomized, Controlled Intervention Trial...', above n 34; Cochrane HIV/AIDS Group, *Male Circumcision for Prevention of Heterosexual Acquisition of HIV in Men* (2009).

<sup>51</sup> For a discussion of the high prevalence of HIV in Africa, particularly Southern Africa, and its possible causes see: Daniel Halperin and Helen Epstein, 'Why Is HIV Prevalence So Severe in Southern Africa? The Role of Multiple Concurrent Partnerships and Lack of Male Circumcision: Implications for AIDS Prevention' (2007) 8 *The Southern African Journal of HIV Medicine* 19; John Bongaarts et al, 'Has the HIV Epidemic Peaked?' (2008) 34 *Population and Development Review* 199.

<sup>52</sup> World Health Organisation, *Press Release: WHO and UNAIDS Announce Recommendations from Expert Consultation on Male Circumcision for HIV Prevention* (2007).

<sup>53</sup> Alex Wodak and Brian Morris have been particularly vocal advocates of this position, see: Julia Medew, 'Doctor Calls for Cut to Curb HIV', *Sydney Morning Herald* (Sydney) 24 January 2009, 7; David Cooper, Alex Wodak and Brian Morris, 'The Case for Boosting Infant Male Circumcision in the Face of Rising Heterosexual Transmission of HIV' (2010) 193 *The Medical Journal of Australia* 318.

<sup>54</sup> Australian Federation of AIDS Organisations, *Male Circumcision and HIV* (2009) 1-2.

<sup>55</sup> See for example: John Murray, 'Circumcision No Barrier to HIV', *The Australian* (Australia) 14 March 2009, 13. For a discussion of the potential significance of circumcision as a health measure against HIV in the United States

note that HIV is not at all as commonly spread from women to men via vaginal sex in Australia as it is in Africa. The AFAO noted in its policy statement that the risk of an Australian born man acquiring HIV, if he does not inject drugs, or engage in sex with men, is at an already remote likelihood of 0.02%.<sup>56</sup> A relative risk reduction of even sixty percent for female to male sexual transmission of HIV would not be as nearly significant in Australia as it would be in Africa.<sup>57</sup> This is because even a large reduction of an extremely remote risk is not ordinarily considered as notable as even a small reduction of a substantial risk.

A large roll out of circumcision in Australia would result in many thousands of Australian men being circumcised even though there is only an extremely remote likelihood of them ever coming into contact with HIV via heterosexual sex. The incomplete protection offered by circumcision will also mean that the few that are circumcised, and do actually come in contact with HIV via heterosexual sex in Australia, will not necessarily avoid infection.

The analysis of the evidence of circumcision's potential as a public health measure against HIV acquisition by public health policy makers correlates with their assessment of circumcision as a public health measure generally. The RACP, in their most recent policy statement, after reviewing the evidence supporting circumcision's potential to reduce the likelihood of a man contracting a wide range of conditions, concluded that:<sup>58</sup>

...the frequency of diseases modifiable by circumcision, the level of protection offered by circumcision and the complication rates of circumcision do not warrant routine infant circumcision in Australia and New Zealand.

The position of Australia's policy makers on the weakness of the significance of circumcision's potential health benefit in an Australian context, and for the typical Australian, has not changed significantly for decades, and is unlikely to change anytime in the near future.<sup>59</sup> Furthermore, no authoritative health policy maker recommends circumcision as a health measure in any jurisdiction with a frequency of relevant health conditions as low as that in Australia. Health policy makers in some jurisdictions with a comparable frequency of relevant conditions, but where circumcision has never been the norm, actively seek to discourage the performance of circumcision for health reasons in their jurisdiction.<sup>60</sup>

Circumcision, along with the potential health benefits discussed, also has known and potential negative effects on health. These effects include: pain, negative alteration to function, and potential complications. These known and potential negative effects on health are weighed against the potential health benefits of circumcision by proponents in the circumcision health debate. The known and potential costs of circumcision on health, beginning with the pain felt both during and after the procedure, are discussed below.

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see: Patrick Sullivan et al, 'Male Circumcision for Prevention of HIV Transmission: What the New Data Mean for HIV Prevention in the United States' (2007) 4 *Plos Medicine* 1162.

<sup>56</sup> Australian Federation of AIDS Organisations, *Male Circumcision and HIV*, above n 52, 2.

<sup>57</sup> Studies have come to a similar conclusion on the significance of male circumcision as a stratagem to reduce HIV infections in the United Kingdom, see for example: Brian Rice, Valerie Delpech and Barry Evans, 'Could Male Circumcision Reduce HIV Incidence in the UK?' (2008) 9 *HIV Medicine* 329.

<sup>58</sup> Royal Australasian College of Physicians, *Circumcision of Infant Males* (2010) 5.

<sup>59</sup> For the last four authoritative Australian policy statements, all of which have refused to endorse or which have suggested discouraging circumcision in Australia for health reasons, see: Royal Australasian College of Physicians, *Circumcision of Infant Males* (2010); Royal Australasian College of Physicians, *Position Statement on Circumcision* (2004); The Australian College of Paediatrics, *Position Statement* (1996); The Australian College of Paediatrics, *Official Statement on Circumcision* (1983).

<sup>60</sup> See for example: Royal Dutch Medical Association, *The Non-therapeutic Circumcision of Male Minors* (2010).

Circumcision, however it is performed, is painful. There is a consensus in the medical community that both adults and children, including infants, experience pain during and for a period of time after the procedure.<sup>61</sup> Modern medical literature now recognises that pain relief ought to be employed for all circumcisions, both for patient comfort, and to reduce the risk of surgical complications.<sup>62</sup> Not all methods used to reduce pain are equally effective.<sup>63</sup> There is no standard method of pain relief for circumcision in Australia. No matter what method or combination of methods is employed by a circumciser (cutting, crushing or laser burning) part of the natural and healthy human body is excised by the procedure. Every method of circumcising is painful, and all require an incision to be made into the foreskin. Even methods that primarily rely on crushing the foreskin, like the Plastibell clamp or the Tara KLamp, are often performed only after the prepuce opening is widened by means of a longitudinal cut through the foreskin.<sup>64</sup>

Most circumcisions performed on young children require forcible separation of normal flesh adhesions, which can prevent full retractability of the foreskin, between the glans and the foreskin.<sup>65</sup> This separation can be painful and its performance can result in complications. The development of foreskin retractability was once, and is still quite widely, misunderstood. Circumcision was once recommended whenever a person could not retract his foreskin. It is now known that premature and forcible manual retraction of the foreskin can result in several deleterious conditions. Extremely few boys have a fully retractable foreskin, and no flesh adhesions, before the age of 1. Over 90% of males will have a fully retractable foreskin by their late teens.<sup>66</sup> The majority of boys will not have a fully retractable foreskin until around the age of ten.<sup>67</sup>

Circumcision also has other certain and potential negative consequences beyond pain. An unaltered foreskin has some accepted, and several disputed, beneficial functions affected by circumcision: it is highly innervated and may enhance sexual pleasure; it may encourage the

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<sup>61</sup> There are many articles, policy statements and reviews on the pain of circumcision, see for example: Royal Australasian College of Physicians, *Circumcision of Infant Males* (2010) 9; American Academy of Pediatrics, above n 33, 688; John Goodman and Patrick McGrath, 'The Epidemiology of Pain in Children and Adolescents: A Review' (1997) 278 *Journal of the American Medical Association* 2157; Janice Lander, Barbara Brady-Freyer and Natasha Wiebe, 'Pain Relief for Neonatal Circumcision' (2009) 1 *Cochrane Database of Systematic Reviews* 5.

<sup>62</sup> See: Janice Lander et al, 'Comparison of Ring Block, Dorsal Penile Nerve Block, and Topical Anesthesia for Neonatal Circumcision' (1997) 278 *Journal of the American Medical Association* 2158.

<sup>63</sup> In favour of the ring block see: *Ibid.* In favour of more than one form of anaesthetic see: Anna Taddio et al, 'Combined Analgesia and Local Anesthesia to Minimize Pain During Circumcision' (2000) 154 *Archives of Pediatrics and Adolescent Medicine* 620. Suggesting Acetaminophen (paracetamol) is insufficient to relieve the pain of circumcision see: Cynthia Howard, Michael Weitzman and Fred Howard, 'Acetaminophen Analgesia in Neonatal Circumcision: The Effect on Pain' (1994) 93 *Pediatrics* 641. For a review that suggests dorsal penile nerve block performs better than EMLA cream see: Janice Lander, Barbara Brady-Freyer and Natasha Wiebe, above n 59.

<sup>64</sup> See: Joel Teichman, *Common Problems in Urology* (2001) 42-47; Laurie Marbas and Erin Case, *Blueprints Clinical Procedures* (2004) 198-202. For a detailed description of a Gomco Clamp procedure see: Thomas Zuber and Edward Mayeaux, *Atlas of Primary Care Procedures* (2003) ch 45.

<sup>65</sup> Judith Turow, Jay Goldberg and Erika Johnston, 'Circumcision' in Gary Emmett (ed), *Field Guide to the Normal Newborn* (2004) 120, 120.

<sup>66</sup> The approximate ages used in this paper were generalised from the following studies: Abhinav Agarwal, Anup Mohta and Ritesh Anand, 'Preputial Retraction in Children' (2005) 10 *Journal of Indian Association of Pediatric Surgeons* 89; Douglas Gairdner, 'The Fate of the Foreskin: A Study of Circumcision' (1949) 2 *British Medical Journal* 1433; Jakob Oster, 'Further Fate of the Foreskin: Incidence of Preputial Adhesions, Phimosis, and Smegma among Danish Schoolboys' (1968) 43 *Archives of Disease in Childhood* 200; Hiroyuki Kayaba et al, 'Analysis of Shape and Retractable of the Prepuce in 603 Japanese Boys' (1996) 156 *Journal of Urology* 1813.

<sup>67</sup> It has been suggested that this slowly developing retractability of the prepuce has the evolutionary purpose of protecting the glans in childhood and discouraging sexual intercourse until later in life, see: Guy Cox, 'De Virginibus Puerisque: The Function of the Human Foreskin Considered from an Evolutionary Perspective' (1995) 45 *Medical Hypotheses* 617.

ejaculatory reflex; it keeps the glans of the penis moist, which may encourage the pleasurable sensitivity of the glans; it may help promote a gliding rather than thrusting motion during sex that reduces dryness and trauma for both partners during vaginal intercourse; it may help facilitate and reduce trauma to the vagina during intromission; and it provides protection to the glans penis and urethral opening from external trauma (particularly in infancy) which can be caused by bodily excretions and other irritants which come in contact with it.<sup>68</sup> The foreskin, beyond these natural functions, may also be important or useful: for repairing genital deformities like hypospadias (an abnormally placed urethral opening); as material on which research may be performed; as a or as part of a particular commodity (skin for skin grafts,<sup>69</sup> treatments for wound care,<sup>70</sup> stem cells<sup>71</sup>);<sup>72</sup> and, for many other miscellaneous and unexpected purposes not related to health, as, for example a focus of prayer,<sup>73</sup> and as a source of an ingredient in some high end cosmetic face creams.<sup>74</sup> Although it is not suggested that it is a beneficial use, it is intriguing to note that the foreskin has even been used for concealing objects.<sup>75</sup>

Not all potential health costs of circumcision are physical. A person's circumcision status, and their perception of their penis, can also be a significant matter to them and their view of their identity. That is true for both uncircumcised and circumcised men. Circumcision status can potentially affect mental health in this way. Pain and trauma from circumcision in childhood can, at least for some people, have a long lasting and significant effect on a person's mental health.<sup>76</sup> One paper suggests that circumcision may even change the way the brain processes information.<sup>77</sup>

<sup>68</sup> For discussions on the possible functions of the foreskin see: Kristen O'Hara and Jeffery O'Hara, 'The Effect of Male Circumcision on the Sexual Enjoyment of the Female Partner' (1999) 83 *British Journal of Urology International* 79; George Denniston and George Hill, 'Circumcision in Adults: Effect on Sexual Function' (2004) 61 *Urology* 155; Donald Taves, 'Intromission Function of the Foreskin' (2002) 59 *Medical Hypothesis* 180; Patrick Duffy, Anthony Rickwood and David Thomas, *Essentials of Paediatric Urology* (2002) 180-182; Marilyn Milos and Donna Macris, 'Circumcision: Male - Effects Upon Human Sexuality' in Vern Bullough and Bonnie Bullough (eds), *Human Sexuality: An Encyclopedia* (1994) 119; John Taylor, Anthony Lockwood and A Taylor, 'The Prepuce: Specialized Mucosa of the Penis and its Loss to Circumcision' (1996) 77 *British Journal of Urology* 294; John Taylor and Chris Cold, 'The Prepuce' (1999) 83 *British Journal of Urology* 34; Gregory Boyle and Gillian Bensley, 'Adverse Sexual and Psychological Effects of Male Infant Circumcision' (2001) 88 *Psychological Reports* 1106.

<sup>69</sup> John Enderle, Joseph Bronzino and Susan Blanchard, *Introduction to Biomedical Engineering* (2005) 322-324.

<sup>70</sup> Robyn Masseth, 'Apligraf: A Promising New Wound Care Treatment for the 21<sup>st</sup> Century' (2002) *Journal of the National Association of Orthopaedic Technologists* 22, 23.

<sup>71</sup> Outi Hovatta et al, 'A Culture System Using Human Foreskin Fibroblasts as Feeder Cells Allows Production of Human Embryonic Stem Cells' (2003) 18 *European Society of Human Reproduction and Embryology* 1404.

<sup>72</sup> See: Coriell Institute for Medical Research, *Tissue Catalogue* (2010) <<http://ccr.coriell.org/Sections/Search/Search.aspx?PgId=165&q=foreskin>> at 20 October 2010.

<sup>73</sup> Robert Palazzo, 'The Veneration of the Sacred Foreskin(s) of Baby Jesus: A Documented Analysis' in James Helfers (ed), *Multicultural Europe and Cultural Exchange in the Middle Ages and Renaissance* (2005).

<sup>74</sup> For example, the product Vavelta reportedly uses human foreskins: Rosemary Black, 'Vavelta May be the New Wave in Anti-Aging Treatment', *New York Daily News* (New York) 18 November 2008 <[http://www.nydailynews.com/lifestyle/2008/11/18/2008-11-18\\_vavelta\\_may\\_be\\_the\\_new\\_wave\\_in\\_antiaging.html](http://www.nydailynews.com/lifestyle/2008/11/18/2008-11-18_vavelta_may_be_the_new_wave_in_antiaging.html)> at 20 October 2010.

<sup>75</sup> Members of the IRA were known to hide notes under their foreskins when incarcerated: Richard English, *Armed Struggle* (2004) 200-201. A drug runner in Britain used their foreskin to conceal heroin: Simon Davies, 'Dealer Hid Heroin in His Foreskin', *Wilts and Gloucestershire Standard* (United Kingdom) 8 April 2008 <[http://www.wiltsglosstandard.co.uk/news/2181718.dealer\\_hid\\_heroin\\_in\\_his\\_foreskin/](http://www.wiltsglosstandard.co.uk/news/2181718.dealer_hid_heroin_in_his_foreskin/)> at 20 October 2010.

<sup>76</sup> Gregory Boyle et al, 'Male Circumcision: Pain, Trauma, and Psychosexual Sequelae' (2002) 7 *Journal of Health Psychology* 329; Ronald Goldman, *Circumcision the Hidden Trauma* (1997); Ronald Goldman, 'The Psychological Impact of Circumcision' (1999) 83 *British Journal of Urology* 93; John Rhinehart, 'Neonatal Circumcision Revisited' (1999) 29 *Transactional Analysis Journal* 215.

<sup>77</sup> Ronald Immerman and Wade Mackey, 'A Proposed Relationship Between Circumcision and Neural Reorganization' (1998) 159 *The Journal of Genetic Psychology* 367.



However, more research into circumcision's effect on mental health is required before any general effect can be stated conclusively.

Circumcision, like any surgical procedure, also has several potential complications which can negatively affect health should they eventuate. There is no true consensus in the medical literature on an approximate complication rate for circumcision simpliciter. Complication rates cited for circumcisions performed by physicians vary from as low as 0.19% to as high as 55%.<sup>78</sup> A commonly cited figure for neonatal circumcision is 0.2 to 0.6%.<sup>79</sup> Other papers cite a significantly higher rate of between 2 and 10%.<sup>80</sup> Others split the divide suggesting a rate between 0.2 and 3.0%.<sup>81</sup> Studies seem to suggest a marginally higher complication rate can be expected for circumcisions performed within medical facilities when they are performed outside of the neonatal period. Recent studies, for example, have suggested that significant complications are likely to occur at a rate between 1.5% and 3.6% for free hand circumcisions performed on healthy adults by experienced operators in good conditions.<sup>82</sup> A recent systematic review of the relevant literature suggested an average complication rate of 1.5% for minors.<sup>83</sup>

There are differences between the various methods of performing a circumcision as to both the rate of complication, and the type of complications that can occur. Evidence suggests that the likelihood of complications occurring decreases as the training, expertise, familiarity with the method utilised, and the resources of the circumciser increase.<sup>84</sup> Studies have sometimes found substantially higher complication rates for out of hospital circumcisions performed by traditional circumcisers.<sup>85</sup> The complication rate for circumcisions performed by traditional circumcisers in

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<sup>78</sup> For 55% see: Hawa Patel, 'The Problem of Routine Circumcision' (1966) 95 *Canadian Medical Association Journal* 576. For 0.19 see: Thomas Wiswell and Dietrich Geschke, 'Risks from Circumcision During the First Month of Life Compared With Those for Uncircumcised Boys' (1989) 83 *Pediatrics* 1011.

<sup>79</sup> For 0.2% see: William Gee and Julian Ansell, 'Neonatal Circumcision: A Ten-Year Overview: With Comparison of the Gomco Clamp and the Plastibell Device' (1976) 58 *Pediatrics* 824. For 0.3% see: Jacob Chaim et al, 'Circumcision in Israel: A One Year Multicentre Survey' (2005) 7 *Israel Medical Association Journal* 368. For 0.6% see: Kenneth Harkavy, 'The Circumcision Debate' (1987) 79 *Pediatrics* 649.

<sup>80</sup> Nigel Williams and Leela Kapilla, 'Complications of Circumcision' (1993) 80 *British Journal of Surgery* 1231; Ferda Senel, Mustafa Demirelli and Sehmuz Oztek, 'Minimally Invasive Circumcision with a Novel Plastic Clamp Technique: A Review of 7,500 Cases' (2010) 26 *Pediatric Surgery International* 739.

<sup>81</sup> Dimitri Christakis et al, 'A Trade-off Analysis of Routine Newborn Circumcision' (2000) 105 *Pediatrics* 246; Victor Palit et al, 'A Unique Service in UK Delivering Plastibell Circumcision: Review of 9-year Results' (2007) 23 *Pediatric Surgery International* 45; M Atikeler et al, 'Complications of Circumcision Performed Within and Outside the Hospital' (2005) 35 *International Urology and Nephrology* 97.

<sup>82</sup> See: Robert Bailey et al, 'Male Circumcision for HIV Prevention in Young Men in Kisumu, Kenya...', above n 34; Ronald Gray et al, 'Male Circumcision for HIV Prevention in Men in Rakai, Uganda...', above n 34; Bertran Auvert et al, 'Randomized, Controlled Intervention Trial...', above n 34.

<sup>83</sup> Helen Weiss et al, 'Complications of Circumcision in Male Neonates, Infants and Children: A Systematic Review' (2010) 10 *BioMed Central Urology* 2 <<http://www.biomedcentral.com/1471-2490/10/2>> at 20 October 2010.

<sup>84</sup> See for example: Robert Bailey and Omar Egesah, *Assessment of Clinical and Traditional Male Circumcision Services in Bungoma District, Kenya: Complications Rates and Operational Needs* (2006); Valerian Kiggundu et al, 'The Number of Procedures Required to Achieve Optimal Competency with Male Circumcision: Findings from a Randomized Trial in Rakai, Uganda' (2009) 104 *British Journal of Urology* 529.

<sup>85</sup> A study of Turkish circumcisers, for example, found that licensed physicians had a complication rate of 2.56%, whilst traditional circumcisers had an alarming complication rate of 85%: M Atikeler et al, above n 79. A South African study found traditional circumcisers to have a complication rate of 35.3% compared to a complication rate of 17.7% for physicians: Robert Bailey, Omar Egesah and Stephanie Rosenberg, 'Male Circumcision for HIV Prevention: A Prospective Study of Complications in Clinical and Traditional Settings in Bungoma, Kenya' (2008) 86 *Bulletin of the World Health Organization* 669. For a discussion of several studies examining complication rates in Anglophone Africa which did not find traditional circumcision associated with a significantly higher complication rate see: Adamson Muula, et al, 'Prevalence of Complications of Male Circumcision in Anglophone Africa: A Systematic Review' (2007) 7 *BioMed Central Urology* 4 <<http://www.biomedcentral.com/1471-2490/10/2>> at 20 October 2010.

Australia has not been studied. There is literature which suggests that *Mohelim* (Jewish traditional circumcisers who usually undertake some formal surgical training) have a similar complication rate to trained physicians.<sup>86</sup>

The possible complications of circumcision vary from the rare and horrific, including death and penile amputation, to the more common and easily treatable, such as haemorrhaging, for the arrest of which there is a specific Medicare benefit.<sup>87</sup> Without wishing to settle on a particular complication rate for circumcision performed in Australia by trained individuals within safe circumstances, this thesis accepts that, whilst devastating when they do occur, serious complications are extremely rare, and that less serious, but not inconsequential, complications probably occur at a rate of at least 0.2% to 0.6% but perhaps closer to a rate of 2.0% to 3.0%. It also accepts that a higher complication rate, for both minor and serious complications, can reasonably be expected for circumcisions performed in riskier circumstances.

In summary, the available evidence suggests that there are both potential health benefits, and known and potential health costs to circumcision. The evidence is equivocal enough for Australians to differ upon whether circumcision has merit as an individual or public health intervention. However, the available evidence does not seem to indicate anything approaching a clear medical imperative to promote circumcision in Australia in the foreseeable future. Indeed, circumcision's potentially beneficial effect on public health, even if accepted as proven, seems likely to be negligible at best in an Australian context. Whether a person believes that this limited, and, in an Australian context, relatively insignificant potential beneficial effect warrants the promotion of circumcision for health reasons depends upon the weight the person gives to the potential benefits and the known and potential costs of circumcision.

### Concerns: Health

The prevailing view of health policy makers is that the potential prophylactic benefits of circumcision are either too insignificant, or too unsubstantiated, or both, to recommend any Australian male be circumcised at any age for health reasons. The world's leading medical associations do not recommend circumcision for health reasons in countries, like Australia, with a low prevalence of heterosexually acquired HIV.<sup>88</sup> Some medical associations, as mentioned above, even support the introduction of measures to discourage and eventually phase out the performance of non-therapeutic circumcision.<sup>89</sup> However, medical associations in the few developed countries with a tradition of neonatal circumcision, like Australia, still hold that the

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<sup>86</sup> Yoram Mor, 'Circumcision in Israel: A One Year Multicentre Survey' (2005) 7 *Israel Medical Association Journal* 368.

<sup>87</sup> Medicare Australia, *Medicare Benefits Schedule Item No. 30663* (2009).

<sup>88</sup> See in the UK for example: British Medical Association, *The Law and Ethics of Male Circumcision - Guidance for Doctors* (2006). See in Canada for example: Canadian Paediatric Society, *Circumcision: Information for Parents* (2004); Canadian Paediatric Society, *Neonatal Circumcision Revisited* (1996). See in the United States for example: American Academy of Pediatrics, above n 33; The Canadian and United States policies are, at the time of writing, under review. However, medical associations in Canada's provinces have passed their own policy statements in recent years, including, most recently, the College of Physicians and Surgeons of British Columbia, which support the position of the Canadian Paediatric Society. See for example: The College of Physicians and Surgeons of British Columbia, *Circumcision (Infant Male)* (2009).

<sup>89</sup> See for example: Royal Dutch Medical Association, above n 58. Circumcision is also not well received by a majority of surgeons, and several local health authorities, in Sweden: 'Swedish Doctors Refuse to Circumcise Boys', *The Local* (Sweden) 25 July 2009, <<http://www.thelocal.se/20900/20090725/>> at 20 October 2010. Professor Trond Markestad, the head of the Norwegian Medical Association's ethics committee, has also called for non-therapeutic circumcision to be phased out: Michael Sandelson, 'Top Norwegian Doctor Wants Circumcision Phased Out', *The Foreigner* (Norway) 9 August 2010 <<http://theforeigner.no/pages/news/top-norwegian-doctor-wants-circumcision-phased-out/>> at 20 October 2010.

evidence is equivocal enough to take the position that adults ought to have the right to be circumcised at their request, and that, the decision to circumcise a child ought to be left to parents to make in consultation with a trained and well informed medical professional.<sup>90</sup>

However, health advocates in the broader scientific and medical community sometimes differ more markedly in their opinion on circumcision as a health measure. Many health professionals oppose circumcision for health and cost reasons in Australia,<sup>91</sup> some support circumcision for health and cost reasons,<sup>92</sup> and there are some who will remain uncommitted until more information comes to light. The divide within the medical and scientific community is created by inconclusive evidence,<sup>93</sup> the limited nature of circumcision's prophylactic effect against most conditions, competing and sometimes incommensurable conceptions of what 'good health' entails,<sup>94</sup> and, significantly, the persistence of dogma, and the influence of varying psychologies, social traditions and outlooks.<sup>95</sup> Each health advocate takes, in accordance with their opinion of the utility of circumcision as a health measure, a different view upon the merit of measures which can affect the accessibility of the procedure.

However, there is broad agreement on some circumcision health related matters. For instance, it seems probable that all or most Australians would favour improving aseptic, safety, pain relief and ethical standards for circumcision wherever it is to be performed. Most would also probably agree that there is worth, if circumcision is to be performed, in enacting measures to improve the scientific communities' understanding of the interrelationship of circumcision and health.

### **Influence: Health**

The promotion of public health and preventative medicine are key political issues in Australia. Measures that are presented as potentially improving individual or public health will find significant support within Australia. Australians look to the medical, health, and scientific communities to inform their views on the regulation of measures potentially beneficial to health. Australia's established health policy organisations will have significant influence over circumcision regulation in Australia. Individual health advocates, and private health organisations, will also have some influence. However, the potential of a health proponent's argument to influence a law reformer will depend in large part upon how well the argument is substantiated by the available evidence considered in an Australian context.

## **2.3 Ethnicity**

Ethnic groups around the world have practised circumcision, and other forms of genital modification, since time immemorial. These modifications continue to be a significant part of the

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<sup>90</sup> See for example: British Medical Association, above n 86.

<sup>91</sup> See for example: 'Doctors Back Call for Circumcision Ban', *ABC News* (Australia) 9 December 2007 <<http://www.abc.net.au/news/stories/2007/12/09/2113665.htm>> at 20 October 2010.

<sup>92</sup> See for example: Brian Morris, 'Why Circumcision is a Biomedical Imperative for the 21st Century' (2007) 29 *BioEssays* 1147.

<sup>93</sup> The British Medical Association even refused to formulate a firm policy on the health merits of circumcision in 2007 because of the difficulties of doing so 'in the absence of unambiguously clear and consistent medical data on the implications of the intervention.' See: British Medical Association, above n 86.

<sup>94</sup> Good health may mean the uninterrupted continuance of natural functioning, or the reestablishment of functioning at a particular time, or even an improvement to functioning (including the provision of greater resistance to illness or disease). Circumcision may effect many of these different conceptions of 'health'.

<sup>95</sup> For a discussion of these influences on the formation of circumcision policy see: Ronald Goldman, 'Circumcision Policy: A Psychosocial Perspective' (2004) 9 *Paediatrics and Child Health* 630.

social and cultural identity of some members of Indigenous and immigrant communities in Australia. However, these practices have not been completely free of controversy. As recently as January 2010 media reports emerged from Tennant Creek in the Northern Territory carrying the story that three young men had been admitted to hospital with ‘severe lacerations’ and ‘blood pouring down their legs’ from negligently performed ritual genital modifications.<sup>96</sup> These reports alluded to both the possible intoxication of some of the men involved in the ceremony, and the likelihood that force was used to coerce at least one young man into participating in a circumcision ceremony carried out the same day as the negligent circumcisions.<sup>97</sup> One witness recounted how:<sup>98</sup>

This young fella escaped and took off and was running through town. This painted-up bloke was racing after him, and a Toyota was cruising around looking for the boy as well. I think they grabbed him.

These reports from Tennant Creek, and others of an even more disconcerting nature, in both Australia and overseas, have led some to call for tighter regulation, and perhaps even prohibition, of traditional genital modification practices.<sup>99</sup> This section discusses the issues surrounding the regulation of ethnicity related circumcision in Australia, with a particular focus on matters concerning Indigenous Australian genital modification practices. The section begins by providing the background information necessary for understanding the significance and circumstances of an ethnicity related genital modification in Australia.

### **Background: Ethnicity**

The precise originating cause, or causes, of male genital modification in ethnic communities with a longstanding genital modifying tradition are lost to time. Anthropologists and historians have proffered a wide variety of possible explanations for why ritual male genital modification may have been performed for the first time. The possible reasons include: a desire to improve health,<sup>100</sup> a desire to control fertility,<sup>101</sup> a desire to alter sexual sensation,<sup>102</sup> a desire to imitate the form or workings of female genitalia,<sup>103</sup> a desire to imitate the form or workings of the genitalia

<sup>96</sup> Paul Toohey, ‘Circumcision Ceremony Goes Horribly Wrong’, *Northern Territory News* (Northern Territory) 11 January 2010 <[http://www.ntnews.com.au/article/2010/01/11/114641\\_ntnews.html](http://www.ntnews.com.au/article/2010/01/11/114641_ntnews.html)> at 20 October 2010.

<sup>97</sup> ‘Boys Bloodied, but Ritual Ok’, *The Australian* (Australia) 12 January 2010, 6(1).

<sup>98</sup> Paul Toohey, above n 94.

<sup>99</sup> There have been several horrific accounts of traditional circumcision from overseas in 2010 alone, see for example: David Chongo, ‘Botched Circumcision Leaves Solwezi Man Bitterly in Pain’, *Post News Papers Ltd* (Zambia) 17 January 2010 <[http://www.postzambia.com/post-print\\_article.php?articleId=4567](http://www.postzambia.com/post-print_article.php?articleId=4567)> at 20 October 2010; ‘Circumcisions Kill 20 Boys in South Africa’, *BBC News* (United Kingdom) 18 June 2010 <<http://www.bbc.co.uk/news/10350471>> at 20 October 2010; Sapa, ‘14yr old Arrested for Illegal Circumcision’, *Times Live* (South Africa) 4 June 2010 <<http://www.timeslive.co.za/local/article488514.ece/14yr-old-arrested-for-illegal-circumcision>> at 20 October 2010.

<sup>100</sup> See for example: John Hutson, ‘Circumcision: A Surgeon’s Perspective’ (2004) 30 *Journal of Medical Ethics* 238; John Morrison, ‘The Origins of the Practices of Circumcision and Subincision Among the Australian Aborigines’ (1967) *Medical Journal of Australia* 125; Ashley Montagu, *Coming Into Being Among the Australian Aborigines: The Procreative Beliefs of the Australian Aborigines* (revised edition, 2004) 317-318.

<sup>101</sup> See for example: John Cawte, N Djagamara and Murray Barret, ‘The Meaning of Subincision of the Urethra to Aboriginal Australians’ (1966) 39 *British Journal of Medical Psychology* 245.

<sup>102</sup> See for example: *Ibid.*

<sup>103</sup> See for example: Philip Singer and Daniel Desole, ‘The Australian Subincision Ceremony Reconsidered: Vaginal Envy or Kangaroo Bifid Penis Envy’ (1967) 69 *American Anthropologist* 355; Bruno Bettelheim, *Symbolic Wounds: Puberty Rites and The Envious Male* (1955); Gésa Róheim, ‘The Symbolism of Subincision’ (1949) 6 *American Imago* 321; Ashley Montagu, above n 98, 321.

of animals,<sup>104</sup> a desire to imitate a naturally occurring genital deformation (such as hypospadias) in another person,<sup>105</sup> subconscious psychological influences,<sup>106</sup> and many other religious, quasi-religious, and metaphysical reasons.<sup>107</sup> Genital modification, whatever its origins, continues to remain significant for social and cultural reasons to members of some ethnic groups in Australia.

A man's circumcision status can significantly influence their social standing within a circumcising community. It can also, in some communities, affect a man's eligibility for marriage, employment and friendship. It can determine a man's standing within their family, and can, at least historically in some communities, affect their right to participate in social and business matters. Circumcision, within circumcising ethnic communities, is also often linked to the initiation of boys into the rights and responsibilities of manhood.<sup>108</sup> Ritual circumcisers in some communities even consider themselves to be the makers of men.<sup>109</sup> Anthropologist Mervyn Meggitt, commenting in the mid-twentieth century on the importance of circumcision to the Walbiri (Warlpiri) people, an Indigenous Australian circumcising community, noted that:<sup>110</sup>

Circumcision, with its accompanying ceremonies, firmly and unequivocally establishes a youth's status in Walbiri society. Should he fail to pass through these rites, he may not enter his father's lodge, he may not participate in religious ceremonies, he cannot acquire a marriage line, he cannot legitimately obtain a wife; in short, he cannot become a social person.

Although genital modification is not as significant in most circumcising ethnic communities in Australia as it may have been traditionally, genital modification still remains an important part of some men's social identification with, and integration into, their particular ethnic community.

Australia is home to many immigrants from ethnic communities with strongly established circumcising cultures. Little information is known about the practices of these circumcising communities in Australia. Traditional circumcisers from overseas may already be providing traditional circumcision services in Australia. If this is the case it has not yet attracted the attention of academics or the media. However, it is likely that, and there is anecdotal evidence in support of this contention, some members of Australia's ethnic circumcising communities, Indigenous and immigrant, are eschewing either circumcision itself or the use of traditional circumcisers entirely. The following discussion focuses largely upon the circumcising tradition of Indigenous Australians.

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<sup>104</sup> See for example: Philip Singer and Daniel Desole, above n 101.

<sup>105</sup> For a general discussion see: Michael Walter, 'Fetal Symbols: Circumcision, Subincision, Superincision' in George Appell and Triloki Madan (eds), *Choice and Morality in Anthropological Perspective: Essays in Honor of Derek Freeman* (1988) 212, 227-228.

<sup>106</sup> Freud himself once posited a psychological explanation for male genital modifications. For a good discussion of Freud and his views on his own circumcision, and circumcision generally, see: Sander Gilman, *Freud, Race, and Gender* (1995) ch 2.

<sup>107</sup> Indigenous Australians often explain circumcision as a practice first performed on, and learned from, ancient, usually at least part animal, deities, see: Ashley Montagu, above n 98, 323-4; John Cawte, N Djagamara and Murray Barret, above n 99.

<sup>108</sup> For an illustrative discussion of the importance of traditional circumcision in the Xhosa community in South Africa see: Louise Vincent, 'Cutting Tradition: the Political Regulation of Traditional Circumcision Rites in South Africa's Liberal Democratic Order' (2008) 34 *Journal of Southern African Studies* 77, 79-80.

<sup>109</sup> 'Circumciser Story: Making Boys Men', *BBC News* (United Kingdom) 1 August 2008 <<http://news.bbc.co.uk/2/hi/africa/7536892.stm>> at 20 October 2010.

<sup>110</sup> Mervyn Meggitt, *Desert People: A Study of the Walbiri Aborigines of Central Australia* (1962) 309.

Circumcision was, and is still somewhat, prevalent in many Indigenous Australian communities, particularly those situated away from Australia's eastern and southern coasts.<sup>111</sup> It is also still widely performed outside conventional medical facilities with the knowledge of local government. Circumcision is performed in these communities during a ceremonial period known colloquially as 'men's business'. Men's business is surrounded in secrecy. It can take place over a period of days, weeks and sometimes even months.<sup>112</sup> Boys are taught sacred lessons, stories, songs, and dances during this period by community elders.<sup>113</sup> Women and uninitiated men are usually excluded from participating in, or gaining knowledge of, most of the important ceremonial acts (including the circumcision) during men's business.<sup>114</sup> Men's business ceremonies differ from one community to the next, and vary in their adherence to the practices of the past. However, anthropological literature provides a partial picture of what a typical Indigenous Australian circumcision ceremony entails.

The literature suggests that the timing of men's business is usually left to elder males in the community.<sup>115</sup> Boys are typically selected for men's business, depending on the tradition in their community, just prior to, at the onset of, or in the early stages of puberty (ages 6-15).<sup>116</sup> However, the precise timing of men's business differs between communities, and the timing is not typically dependent upon the attainment of a particular age. Once it is time for the circumcision the boy is led, and in some instances forcibly taken by their elders to a designated outdoor area.<sup>117</sup> The child is then usually laid on their back, or sat reclined facing the sky (either upon the earth or upon one or more elders).<sup>118</sup> The attending elders hold and spread the arms and legs of the boy, and often have a man sit on the boy's chest to restrain him during the procedure.<sup>119</sup> Once restrained, a man, who is usually not a relative of the person to be circumcised, arrives at the site to perform the circumcision.<sup>120</sup>

Circumcision is the most common genital modification practised by Indigenous Australians. However, it is not the only one. Subincision, colloquially known as 'whistle cock', is perhaps the most prevalent of the non-circumcision simpliciter genital modifications in Australia.<sup>121</sup> Subincision involves the making of an incision into the glans of the penis tracking down the

<sup>111</sup> For a general discussion of the places circumcision and subincision were practised, and how they were practised there, see: Adolphus Elkin, *Aboriginal Men of High Degree: Initiation and Sorcery in the World's Oldest Tradition* (1993) 20-29. For a discussion of where subincision was traditionally practiced see: Herbert Basedow, 'Subincision and Kindred Rites of the Australian Aboriginal' (1927) 57 *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* 123, 131-3.

<sup>112</sup> Hung Nguyen, 'Patient Centred Care: Cultural Safety in Indigenous Health' (2008) 37 *Australian Family Physician* 990, 991. For an interesting description of the sometimes lengthy process of initiation and men's business traditionally, see: Ronald Berndt, *Australian Aboriginal Religion: The North-Eastern Region and North Australia* (1974) vol 2, 11-23.

<sup>113</sup> Cameron Forbes, 'Australia: Secrets of Dreamtime' (1984) 138 *The New Internationalist* 14; Ronald Berndt, above n 110, 11-23.

<sup>114</sup> Ronald Berndt, above n 11, 11-23; Cameron Forbes, above n 111.

<sup>115</sup> Cameron Forbes, above n 111.

<sup>116</sup> For a discussion of a community which circumcises ages 6-8 see: Victoria Burbank, *Aboriginal Adolescence: Maidenhood in an Australian Community* (1988) 34. For a discussion of a community which circumcises ages 11-13 see: Cameron Forbes, above n 111. For a discussion of a community which circumcises around age 14 see: John Withnell, *The Customs and Traditions of The Aboriginal Natives of North Western Australia* (1965) 7-8. For a general overview of Indigenous circumcision practices which suggests an average age for circumcision of about 12 see: David Gollaher, above n 17, 60.

<sup>117</sup> Paul Toohey, above n 94.

<sup>118</sup> David Gollaher, above n 17, 60-61.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid* 61.

<sup>121</sup> For several other synonyms for subincision see: Herbert Basedow, above n 109, 134.

underside of the penis into the urethra. Subincision, although sometimes performed in lieu of circumcision, is generally performed later in life, and usually only after the circumcision of the person to be subincised. Subincision would not usually be performed upon a man living in an Indigenous Australian community until after the man had attained physical adulthood and a higher level of maturity and cultural standing. However, the time for subincising differs between communities.<sup>122</sup> Traditionally, the subincision wound, a split in the penis open two to three centimetres from the glans, is gradually extended (sometimes all the way to the base of the penis) or used as a site for ritual blood letting, in future ceremonies.<sup>123</sup>

There is little uniformity in the methods employed during or after traditional Indigenous Australian circumcision ceremonies. Surgical instruments are sometimes used in place of traditional tools. Health service workers provide elders in some communities with free ceremonial surgical kits which contain sterile surgical instruments, wound care dressings, and pain relief.<sup>124</sup> However, flint stones, and other, not always sterile hand made tools were once used, and are still known to be used on occasion.<sup>125</sup> Anaesthetic, especially to a pain relief standard which may be expected in a hospital, is not uniformly employed, and circumcision wounds are still treated by some traditional circumcisers with balms and bandages made by hand from natural resources.<sup>126</sup> This style of wound care treatment may involve cauterisation, the use of animal fat, ochre, ash, and/or wet leaves, and the passing of the circumcised boy over smoke from a ceremonial fire.<sup>127</sup>

In summary, the forms of ethnicity associated circumcision performed in Australia can be loosely categorised into three groups: those performed in a conventional medical setting; those performed outside of conventional medical settings but with significant regard for modern ethical, health and safety standards; and those performed outside of medical settings with less than a full regard for modern ethical, health and safety standards.

### Concerns: Ethnicity

The relevance of circumcision (and other traditional genital modifications) has diminished significantly in some ethnic communities. This may be for several reasons, including: the assimilation of members of these communities into wider non-circumcising Australian culture; the inconvenience of the procedure (particularly if it is to be performed in a traditional manner); and, concerns over the known and potential negative effects on health of the procedure. However, members of circumcising ethnic communities, will, on the whole, be unlikely to accept the complete prohibition of the genital modifications traditional to their community.

Members of ethnic circumcising communities which no longer require circumcision to be performed outside of a conventional medical setting can be expected to be more willing to accept

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<sup>122</sup> For a discussion on different timing see: *Ibid* 124-125.

<sup>123</sup> For a discussion of the reopening of subincision wounds see: Derrick Pounder, 'Ritual Mutilation: Subincision of the Penis Among Australian Aborigines' (1983) 4 *The American Journal of Forensic Medicine and Pathology* 227.

<sup>124</sup> 'Aboriginal Circumcision Ceremony Marred By Alcohol', *The Courier Mail* (Sydney) 10 January 2010 <<http://www.couriermail.com.au/news/national/aboriginal-circumcision-ceremony-marred-by-alcohol/story-e6freooo-1225817877882>> at 20 October 2010; Larine Statham, 'Ceremonial Circumcisions Being Botched in NT', *Sydney Morning Herald* (Sydney) 11 January 2010 <<http://news.smh.com.au/breaking-news-national/ceremonial-circumcisions-botched-in-nt-20100111-m2kf.html>> at 20 October 2010.

<sup>125</sup> There is even an account of circumcision being performed with a burning stick by one community. For a description of this practice, and the use of other traditional tools, see: Herbert Basedow, above 109, 125-126, 141-143.

<sup>126</sup> David Gollaher, above n 17, 61-62; Herbert Basedow, above n 109, 139-140

<sup>127</sup> David Gollaher, above n 17, 61-62. For a description of the traditional treatment of wounds see also: Herbert Basedow, above n 109, 139-140

greater regulation of circumcision than their more traditional counterparts. Proponents of more traditional circumcision ceremonies will be likely to oppose external and mandatory regulation or government intervention in their ceremonies. They are unlikely to accept regulation which attempts to, or does, prohibit or significantly modify important, and not always uncontroversial, elements of these ceremonies, such as: the use of certain tools, the employment of particular circumcising methods, the style of genital modification performed, the use of coercion and sometimes even force to compel participation, the sex of the participants involved in the ceremony, and the freedom to designate the site for, and the timing of, the circumcision.

Some ethnic circumcising communities will also be reluctant to accept a regulatory regime which does not maintain the exclusive and often largely secret nature of their traditional ceremonies. These concerns may make them reluctant to accept regulation involving independent monitoring and information collection. Particular cultural and social beliefs, such as the belief in the necessity of excluding women from men's business, may also need to be respected and accounted for by regulators before members of a circumcision community accept a circumcision regulatory regime. Similar concerns have been raised in South Africa in regard to the regulation of traditional circumcision (see discussion from page 134). At least one South African town has attempted to accommodate traditional circumcising customs by various means, including offering conventional health care services during the initiation period to circumcision initiates in the circumcision in which previous initiates were harmed.<sup>128</sup>

### **Influence: Ethnicity**

It is extremely difficult to provide an accurate approximation of the number of people who support circumcision in Australia because they identify with an ethnic circumcising community. Thousands of migrants living in Australia are from African countries which have an extremely high prevalence of ethnicity associated circumcision. There are also many people living in Australia who are originally from other countries, such as the United States, Korea, Papua New Guinea and the Solomon Islands, where many practise circumcision for social and cultural reasons. It is also known that at least some of the almost half a million Indigenous Australians living in Australia identify with a community which supports some form of genital modification.<sup>129</sup> The influence of the members of Indigenous circumcising communities can be expected to be felt particularly strongly in the centre, north, and northwest of Australia, including the Northern Territory more generally, where Indigenous Communities, and Indigenous circumcising communities in particular, are more numerous, and represent a higher proportion of the general population.<sup>130</sup>

The continuance of ethnicity related circumcision is also supported by many Australians who are not from a circumcising ethnic community. Many recognise merit in protecting a significant sphere of freedom for traditional ethnic practices. Traditional practices can help foster a strong sense of cultural identity which can be essential to maintaining a close and functioning community. It may also be politically risky to condemn some traditional practices in Australia. Politicians have previously condoned traditional Indigenous circumcision practices. A Northern Territory minister publicly stated, following media criticism of the three botched traditional circumcisions mentioned in the introduction to this section, that Indigenous Australian

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<sup>128</sup> Louise Vincent, 'Cutting Tradition...', above n 106, 82.

<sup>129</sup> 455,031 people identified themselves as Indigenous in the 2006 census. This was 2.3% of Australia's total population at the time: Australian Bureau of Statistics, *2006 Census QuickStats: Australia* (2007).

<sup>130</sup> Indigenous Australians comprised of 27.8% of the Northern Territory's population in 2006: Australian Bureau of Statistics, *2006 Census QuickStats – Northern Territory* (2007).



circumcision ceremonies were 'to be preserved', and that government should be looking to '...support the traditional elders with their cultural practices in a supportive, but not an invasive way.'<sup>131</sup> There may also be pressure domestically to protect ethnicity related circumcision in Australia to better cultivate Australia's image internationally as a pluralistic and tolerant society.

There is precedent, and a legal basis, for special laws protecting the way of life of particular ethnic communities. The *Commonwealth Constitution* gives Australia's parliament the power to make laws with respect to 'people of any race for whom it is deemed necessary to make special laws',<sup>132</sup> and, existing domestic and international human rights law may already provide some legal protection and recognition to important ethnicity associated genital modifications (see discussion from page 123). Three provinces in South Africa have shown that it is possible to pass legislation to improve the regulation of traditional circumcision practices without significant international condemnation.<sup>133</sup>

However, there are elements of some traditional ethnic genital modification rituals which have been subject to criticism, and sometimes condemnation, above and beyond that levelled at circumcision generally. These elements include: the use of force and coercion to compel capable minors to participate; poor health, safety and pain minimisation standards; and the grievous nature of some of the genital modifications performed. There is unlikely to be much support within general Australian society, or even the communities which practise traditional genital modification, for some, or all of these elements. Procedures with these elements may also be more likely to contravene existing criminal, civil, and human rights law.

## 2.4 Social Tradition

Circumcision was largely unheard of as a secular practice in Australia until after the turn of the 20<sup>th</sup> century.<sup>134</sup> However, the vast majority of boys born in Australia came to be circumcised by the middle of the twentieth century. The percentage of children being circumcised has dropped dramatically since the mid-twentieth century. Circumcision is, once again, no longer performed upon a majority of boys born in Australia. Only approximately 12-15% of boys born in Australia in 2008 were circumcised within 6 months of their birth.<sup>135</sup> However, this rate of newborn circumcision is still remarkably high considering the fact that most of Australia's public hospitals refuse to perform the procedure, and Australia's medical associations have not endorsed circumcision for decades.

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<sup>131</sup> 'Boys Bloodied, but Ritual Ok', above 95, 6(1).

<sup>132</sup> *Commonwealth Constitution* s 51 XXVI.

<sup>133</sup> However, it must be noted that some traditional leaders opposed the regulation domestically, see: Pat Sidley, 'Eastern Cape Tightens Law on Circumcision to Stem Casualties' (2001) 323 *British Medical Journal* 1090 <<http://www.bmj.com/cgi/content/full/323/7321/1090/b>> at 20 October 2010. Some traditional leaders still oppose significant aspects of the intervention, see: Louise Vincent 'Cutting Tradition...', above n 106, 88.

<sup>134</sup> For a good discussion of the growth of circumcision in Australia see: Robert Darby, 'A Source of Serious Mischief: The Demonisation of the Foreskin and the Rise of Preventative Circumcision in Australia' in George Denniston, Frederick Hodges and Marilyn Milos (eds), *Understanding Circumcision: A Multidisciplinary Response to a Multi-dimensional Problem* (2001) 153.

<sup>135</sup> This approximate circumcision rate for children under the age of six months in 2008 in Australia was gathered by comparing the birth rate of male babies in Australia to the number of circumcisions claimed on Medicare for children under six months of age in Australia in 2008. The margin of the approximate number is increased by a couple of percentage points to account for all, or at least some, of the circumcisions performed in Australia but not claimed on Medicare. In 2008 19,656 claims against Medicare were made for the circumcision of children under six months of age. See: Medicare Item 30653 processed from January 2008 to December 2008. Medicare Australia, *Medicare Item Reports* (2009) <[https://www.medicareaustralia.gov.au/statistics/mbs\\_item.shtml](https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml)> at 20 October 2010. In 2008 152,287 boys were born in Australia. See: Australian Bureau of Statistics, *3301.0 - Births, Australia, 2008* (2009).

The vast majority of circumcisions performed in Australia are performed for social or cultural reasons, or, because of the influence of circumcising norms on the decision making of particular parents. Rowena Hitchcock, a paediatric surgeon, once described the culture of circumcising babies in much of the English speaking world as ‘a social ritual with a grain of medical origin’.<sup>136</sup> This section discusses the ‘social ritual’ of circumcising and its ‘medical origin’ in Australia. The section begins by identifying the main influences which have shaped the evolution of social and cultural circumcision in Australia.

## Background: Social Tradition

The ‘medical origin’ of Australia’s circumcising social ritual emerged in the late 18<sup>th</sup> century. Some physicians began to commend circumcision at this time in the belief that it could: discourage masturbation; reduce the risk of contracting syphilis; and treat an amazing array of largely imagined illnesses.<sup>137</sup> However, circumcision was not widely accepted in medical circles or general Australian society until the twentieth century. It was not until then that a series of events coincided to bring circumcision into the lives of ordinary Australians. These events included: a burgeoning, but poorly substantiated and defined belief that circumcision could improve hygiene and health; greater accessibility of circumcision to parents; concerns over the penile hygiene of soldiers during war; support for circumcision in child rearing books; the spread of private and public health insurance covering circumcision;<sup>138</sup> and the cross cultural influence of a growing circumcising tradition in Britain and the United States.<sup>139</sup> These events, and other social forces and norms,<sup>140</sup> acted to establish neonatal circumcision as the prevailing norm in Australia by the middle of the twentieth century.

The English speaking world’s circumcising norm was not challenged until the late 1940s. The challenge began in Britain. In 1948, the newly established English National Health Service refused to offer infant circumcision as a fee free service. The following year English paediatrician Douglas Gairdner’s seminal paper, *The Fate of the Foreskin*, refuted the existence of congenital phimosis (i.e. the non-retractability of a child’s foreskin in infancy). Congenital phimosis was the major medical indication for circumcision at the time.<sup>141</sup> These two events, along with other more implicit forces, seem to have counterbalanced the influences encouraging circumcision in Britain. However, articles and letters challenging the medical merits of male circumcision were not regularly published in Australian and American medical journals until the late 1960s,<sup>142</sup> and it was not until 1971 that the Australian Paediatric Association (APA) first explicitly and publicly recommended that: ‘male infants should not, as a routine, be circumcised’.<sup>143</sup>

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<sup>136</sup> Rowena Hitchcock, ‘Commentary’ (1997) 77 *Archives of Disease in Childhood* 260.

<sup>137</sup> See: Robert Darby, ‘A Source of Serious Mischief...’, above n 132.

<sup>138</sup> Robert Darby, *A Surgical Temptation: The Demonisation of the Foreskin* (2006) 288.

<sup>139</sup> The history of how the procedure was incorporated into western medicine has been thoroughly investigated in recent literature. See for example: Robert Darby, *A Surgical Temptation...*, above n 136; David Gollaher, above n 17.

<sup>140</sup> For a discussion of some of the influences on parent decision making see: Sarah Waldeck, ‘Social Norm Theory and Male Circumcision: Why Parents Circumcise’ (2003) 3 *The American Journal of Bioethics* 56.

<sup>141</sup> Douglas Gairdner, above n 64.

<sup>142</sup> See for example: William Morgan, ‘The Rape of the Phallus’ (1965) 193 *Journal of the American Medical Association* 123; Noel Preston, ‘Wither the Foreskin?: A Consideration of Routine Male Circumcision’ (1970) 213 *Journal of The American Medical Association* 1853; John Wright, ‘Non-Therapeutic Circumcision’ (1967) *Medical Journal of Australia* 1083.

<sup>143</sup> Australian Paediatric Association, ‘Circumcision’ (1971) *Medical Journal of Australia* 1148.

Australia's circumcision rate did not decline significantly until the latter half of the twentieth century. Several influences, particularly changes in medical policy, seem to have contributed to the sharp decline seen in the latter half of the twentieth century. In 1983 the Australian College of Paediatrics recommended actions to 'discourage the practice of circumcision in the newborn male infant'.<sup>144</sup> A decade later, in the mid 1990s, the Australasian Association of Paediatric Surgeons and the Australian Medical Association, released separate policy statements discouraging the performance of infant circumcision.<sup>145</sup> It seems that only a minority of Australian physicians attending to newborn babies routinely offered, or advocated the merits of circumcision by the end of the 1990s. Little more than 11% of newborns in Australia were being circumcised by the mid 1990s.<sup>146</sup> Articles and legal papers questioning or challenging the ethics and legality of male circumcision,<sup>147</sup> many written by legal scholars or members of newly formed anti-circumcision information groups,<sup>148</sup> further influenced the decline in circumcision prevalence to a rate which has remained quite steady in Australia since the 1990s.

However, Australia's circumcising social ritual is not extinct. In 2010, if current trends continue (with a circumcision rate of 12-15%), approximately 20,000, or 1 in 7 male babies born in Australia, will be circumcised before they reach 6 months of age. It is difficult to accurately discern the reasons for the performance of these circumcisions because parents do not have to disclose their reasons for circumcising. It is likely that the decision making of most circumcising parents in Australia is influenced by one or more of the following: familiarity, convenience, aesthetics, family tradition, conformity, and a positive perception of circumcision's potential health benefits. A study conducted in Victoria of 136 parents who had their child circumcised found 'hygiene' and 'family tradition' to be the most often cited reasons for having the procedure performed.<sup>149</sup> A study in the United States suggested that concerns about the attitudes of peers and their sons' self concept in the future were strong influences upon whether a parent will circumcise or not.<sup>150</sup> The same study also suggested that the father's circumcision status was a key indicator of whether the son would be circumcised.<sup>151</sup> Anecdotal evidence suggests that these findings may also be true in Australia.

The widely held view in Australia that the procedure is, at least potentially, beneficial to health and hygiene, is a strong driving force behind Australia's circumcising tradition. This perception is cultivated by social and cultural pressures as much as it is by rational consideration of the

<sup>144</sup> The Australian College of Paediatrics, *Official Statement on Circumcision* (1983).

<sup>145</sup> The Australian College of Paediatrics, *Position Statement* (1996); Australian Medical Association, 'Circumcision Deterred' (1997) 9 *Australian Medicine* 5.

<sup>146</sup> This approximate minimum circumcision rate for children under the age of six months in 1995 in Australia was gathered by comparing the birth rate of male babies in Australia to the number of circumcisions claimed on Medicare for children under six months of age in Australia in 1995. In 1995, 14,096 claims against Medicare were made for the circumcision of children under six months of age. See: Medicare item 30653 processed from January 1995 to December 1995. Medicare Australia, *Medicare Item Reports* (2010) <[https://www.medicareaustralia.gov.au/statistics/mbs\\_item.shtml](https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml)> at 20 October 2010. In 1995, 131,432 boys were born in Australia. See: Australian Bureau of Statistics, *3301.0 - Births, Australia, 1995* (1997).

<sup>147</sup> Queensland Law Reform Commission, above n 25.

<sup>148</sup> National Organization of Circumcision Information Resource Centers (NOCIRC) was founded in 1986, see: National Organization of Circumcision Information Resource Centers, *Website of the National Organization of Circumcision Information Resource Centers* (2010) <<http://www.nocirc.org/>> at 20 October 2010. The National Organization of Restoring Men (NORM) was founded in 1989. See: The National Organization of Restoring Men, *The National Organization of Restoring Men Site* (2010) <<http://www.norm.org/>> at 20 October 2010.

<sup>149</sup> Bo Xu and Hershel Goldman, 'Newborn Circumcision in Victoria, Australia: Reasons and Parental Attitudes' (2008) 78 *Australian and New Zealand Journal of Surgery* 1019.

<sup>150</sup> Mark Brown and Cheryl Brown, 'Circumcision Decision: Prominence of Social Concerns' (1987) 80 *Pediatrics* 215.

<sup>151</sup> *Ibid.*

evidence. This is because a belief in a circumcising norm is known to, as scholar Sarah Waldeck, recognises,<sup>152</sup>

...color [sic] every aspect of decision making, thereby encouraging an individual to either exaggerate or diminish the significance of other factors in the behavioural calculus.

Waldeck found that parents 'were made visibly uncomfortable', 'expressed resentment' and 'tried to distance themselves' when they were confronted by a physician with accurate health information which conflicted with their beliefs about the potential benefits of circumcision.<sup>153</sup> She also found that parents who favoured circumcision 'demonstrated a clear desire to discount, or perhaps entirely ignore, the costs that would lead them to opt against circumcision.'<sup>154</sup> A 1987 study in the United States by a group of researchers reported that the presentation of accurate and unbiased medical evidence had little effect on a parent's decision to circumcise their child, but increased the dissatisfaction of the parents with their doctor.<sup>155</sup> A 2002 study in the United States involving 190 mothers of boys came to a similar conclusion.<sup>156</sup> A further study in the United States found that 'parents continue to have preformed decisions regarding circumcision based primarily on non-medical concerns, which are unlikely to be changed by attempting neutral discussion of the relative risks and benefits'.<sup>157</sup> The same study found that 80% of the participating mothers made the decision to circumcise before even discussing the procedure with a physician.<sup>158</sup> Circumcision is a special kind of surgery in Australia as it is more often than not first suggested as an option by the layperson patient (or their parents) rather than a medical professional or the practitioner who is to perform it.

The willingness of members of the medical community to commend and perform circumcision in the neonatal period is perhaps the main factor in the continuance of Australia's circumcising tradition. Australia would almost certainly not have a secular circumcising tradition if physicians were unwilling to offer the procedure to parents. The prevalence of circumcision in Australia is tied to the accessibility of the procedure. This may be demonstrated by Medicare statistics. Queensland, a jurisdiction where circumcision remains widely available and openly advertised had a Medicare circumcision claim rate of 17.2% of male infants born in 2008.<sup>159</sup> Whilst Tasmania, a jurisdiction where neonatal circumcision is no longer performed in public hospitals and few private physicians promote or perform the procedure, had a rate of less than 1.0%

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<sup>152</sup> Sarah Waldeck, 'Using Male Circumcision to Understand Social Norms As Multipliers' (2003) 72 *University of Cincinnati Law Review* 455, 455.

<sup>153</sup> Sarah Waldeck, 'Social Norm Theory...', above n 138, 56

<sup>154</sup> *Ibid* 56.

<sup>155</sup> Jay Christensen-Szalanski et al, 'Circumcision and Informed Consent: Is More Information Always Better?' (1987) 25 *Medical Care* 856.

<sup>156</sup> Sharon Binner et al, 'Effect of Parental Education on Decision-Making About Neonatal Circumcision' (2002) 95 *Southern Medical Journal* 457.

<sup>157</sup> Jeffrey Tiemstra, 'Factors Effecting the Circumcision Decision' (1999) 12 *Journal of the American Board of Family Practitioners* 16, 20.

<sup>158</sup> *Ibid* 17.

<sup>159</sup> This approximate minimum circumcision rate for children under the age of six months in 2008 in Queensland was gathered by comparing the birth rate of male babies in Queensland to the number of circumcisions claimed on Medicare for children under six months of age in Queensland in 2008. In 2008 5,603 claims against Medicare were made for the circumcision of children under six months of age. See: Medicare item 30653 processed from January 2008 to December 2008. Medicare Australia, *Medicare Item Reports* (2010) <[https://www.medicareaustralia.gov.au/statistics/mbs\\_item.shtml](https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml)> at 20 October 2010. In 2008, 32,589 boys were born in Queensland. See: Australian Bureau of Statistics, *3301.0 - Births, Australia, 2008* (2009).

(0.98%) in the same year.<sup>160</sup> Although other factors may account for some of the difference, it seems likely that the difference in the levels of accessibility of the procedure has a significant effect on the prevalence of circumcision in the two jurisdictions.

In summary, neonatal circumcision in Australia seems to be a ritual driven in large part by medical physicians willing to commend and perform the procedure on babies, and which is reinforced by social and cultural influences. The tradition is not as strong in some Australian jurisdictions as it is in others. The Medicare circumcision claim rate jurisdictional breakdown suggests that Australia is a country divided by different approaches to neonatal circumcision, in that five of Australia's largest states and territories have a Medicare claim infant circumcision rate of lower than 8%, whilst three others have rates exceeding 15%. The breakdown is as follows: Tasmania (1%), Northern Territory (3%), Australian Capital Territory, Western Australia and Victoria (6-7%), South Australia (15%), and Queensland and New South Wales (17-18%).<sup>161</sup>

### **Concerns: Social Tradition**

Australian parents who feel strongly about having the right to have their child circumcised for secular social and cultural non-ethnicity related reasons will oppose regulation prohibiting circumcision. These parents will push for measures to ensure that the procedure remains as accessible and as safe as possible. However, the dramatic decline in the Australia wide circumcision rate since the mid-twentieth century, and the lower circumcision rate in jurisdictions where circumcision has not been easily accessible to parents for some time, suggests that at least some proponents of secular social and cultural circumcision will be willing to change their beliefs to conform to the prevailing practice.

### **Influence: Social Tradition**

A large minority of Australians, many of whom are themselves circumcised, or parents or partners to circumcised men, may support the enactment of legislation to establish the lawfulness of male circumcision. These people, spread throughout the country, can be expected to be relatively more numerous, and perhaps influential, in Queensland, New South Wales and South Australia, the three states where the Medicare claim rate for neonatal circumcision remains above 15%.

However, not all of the participants in Australia's circumcising social ritual will be passionate advocates in favour of its continuance. Most, by and large, seem to favour circumcision in a passive manner. Australia's circumcising social ritual is built upon a broad spectrum of loosely

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<sup>160</sup> This approximate minimum circumcision rate for children under the age of six months in 2008 in Tasmania was gathered by comparing the birth rate of male babies in Tasmania to the number of circumcisions claimed on Medicare for children under six months of age in Tasmania in 2008. In 2008, 34 claims against Medicare were made for the circumcision of children under six months of age. See: Medicare item 30653 processed from January 2008 to December 2008. Medicare Australia, *Medicare Item Reports* (2010) <[https://www.medicareaustralia.gov.au/statistics/mbs\\_item.shtml](https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml)> at 20 October 2010. In 2008 3,453 boys were born in Tasmania. See: Australian Bureau of Statistics, *3301.0 - Births, Australia, 2008* (2009).

<sup>161</sup> These approximate minimum circumcision rates for children under the age of six months in each jurisdiction in Australia were gathered by comparing the birth rate of male babies in each jurisdiction to the number of circumcisions claimed on Medicare for children less than six months of age in each jurisdiction in 2008. See: Medicare item 30653 processed from January 2008 to December 2008. Medicare Australia, *Medicare Item Reports* (2010) <[https://www.medicareaustralia.gov.au/statistics/mbs\\_item.shtml](https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml)> at 20 October 2010. See: Australian Bureau of Statistics, *3301.0 - Births, Australia, 2008* (2009).

entrenched, and not always particularly meaningful social and cultural influences. A law reformer will be mindful that Australia's circumcising social ritual is capable of being influenced by, as much as it is capable of influencing, law reform and other social influences.

## 2.5 Autonomy

Autonomy is a philosophical concept with a long historical tradition. The term comes from the Ancient Greek *autonomia* from *autonomos* meaning self-law or self-rule. The concept is at the core of liberal democratic thinking, and is usually considered to be, as political philosopher Joseph Raz recognises:<sup>162</sup>

...the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.

Autonomy can refer to two abilities: that of a person to determine their conception of the good life (which is the focus in Raz's quote above); and that of a person to live according to their conception of the good life. Proponents of autonomy demand decision makers consider and respect the world view of the people to be affected by the decision they are to make. The concept is, for this reason, frequently utilised in legal, moral and bioethical argument over contentious surgeries. This section begins with a brief discussion of the concept of autonomy, with a particular focus upon the potential use of the concept in the debate over the circumcision of minors.<sup>163</sup>

### Background: Autonomy

The concept of autonomy is, as ethicist Wim Dekkers suggests, person orientated.<sup>164</sup> Its promotion requires decision makers, in the context of contentious surgery, to consider and respect how the person to be operated upon might perceive an interference with their body. Surgery, in all circumstances, can only be said to be in the interest of another's autonomy if the operation accords with that particular person's world view. For an adult, the inquiry of the surgeon concerned about their patient's autonomy may be limited to informing the adult of his options, and asking the patient about the course of action he wishes to take. However, the inquiry is of greater complexity, and is open to greater disagreement, when the subject of surgery is a minor. Young children are unable to make well informed future decisions on matters concerning their welfare, and decision makers are unable to accurately determine with certainty which world view, or conception of the good life, a child will adopt later in life.

Proponents of autonomy do not take a uniform approach to making decisions on behalf of minors too young to decide matters themselves. There are two main approaches: the minimalist approach, which condemns the non-therapeutic circumcision of children outright; and the future orientated consent approach, which suggests that there are at least some circumstances in which the circumcision of an incapable minor may promote their autonomy.

The minimalist approach favours delaying the decision to circumcise until the child can decide the matter for themselves. Its advocates oppose circumcision in childhood for two reasons: first,

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<sup>162</sup> Joseph Raz, *Freedom of Morality* (1986) 369.

<sup>163</sup> For an excellent discussion of the concept of autonomy in the circumcision debate see: Richard Shweder, 'Shouting at the Hebrews: Imperial Liberalism v Liberal Pluralism and the Practice of Male Circumcision' (2009) 5 *Law, Culture and the Humanities* 247.

<sup>164</sup> Wim Dekkers, 'Routine (non-religious) Neonatal Circumcision and Bodily Integrity: A Transatlantic Dialogue' (2009) 19 *Kennedy Institute of Ethics Journal* 125, 134.

because they wish to protect children from maturing into adults who resent the decision being made for them; and second, because they believe the certain and potential costs of circumcision are too significant for a person to have to live with without their prior acquiescence. They argue that autonomy is best promoted by allowing individuals to choose options ‘...themselves wherever possible rather than being pre-empted in their decisions...’.<sup>165</sup> The proponents of the minimalist approach have the aim of increasing the options the child can select from in the future. This approach to the autonomy of children accords with the suggestion in the English Court of Appeal in *Re A Minors (Conjoined Twins: Separation)* that every human being has a right to life, and that this right carries with it, as an intrinsic part,<sup>166</sup>

...the right to have one’s own body whole and intact and (upon reaching an age of understanding) to take decisions about one’s body.

Advocates of the future orientated consent approach hold that a parent may authorise the circumcision of their child if, on the basis of what is known at the time of the decision, it can be persuasively argued that their decision would come to be appreciated by their child once they had matured. Gerald Dworkin, the philosopher who coined the term ‘future orientated consent’, described the approach as essentially a wager, a wager that the child in question will eventually come to recognise the wisdom of the decision made on their behalf.<sup>167</sup>

Neither approach fully reflects the concept of autonomy in its application to the decision making of well informed rational adults. The minimalist approach fails to accommodate the fact that circumcision in childhood, like many other, albeit perhaps less controversial interventions authorised by parents, can play an important and positive part in some people’s lives, and that some children will develop into adults who adopt a world view favourable to circumcision being performed upon them in childhood. The future orientated consent approach underemphasises both the importance of allowing people to determine the matters affecting them themselves and the risk that the child may grow up to resent the irreversible harm resulting from a decision which was made for them.

### **Concerns: Autonomy**

Advocates of autonomy will seek the implementation of reforms which will empower decision making. They will seek the introduction of measures to improve the provision of accurate information relevant to the decision to circumcise, and which will make circumcision more accessible to people able to express a wish to be circumcised.

Proponents of the minimalist approach will seek the prohibition of circumcision of incapable minors. Proponents of the future orientated consent approach will oppose the prohibition of the circumcision of incapable minors. Proponents of the latter approach will probably argue for the establishment of a decision making process which, in the most informed manner possible, focuses upon determining, and carrying out, the decision that the child will most likely come to appreciate once they have matured. The particular approach preferred to do this may differ from proponent to proponent.

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<sup>165</sup> Rebecca Mussell, ‘The Development of Professional Guidelines on the Law and Ethics of Male Circumcision’ (2004) 30 *Journal of Medical Ethics* 254, 254.

<sup>166</sup> *Re A Minors (Conjoined Twins: Separation)* [2000] Lloyd’s Rep Med 425, 494.

<sup>167</sup> Gerald Dworkin, ‘Paternalism’ in Rolf Sartorius (ed), *Paternalism* (1984) 19, 28.

### **Influence: Autonomy**

The worthiness of protecting and promoting autonomy is strongly recognised in ethical guidelines, human rights instruments and domestic law. The promotion and protection of the autonomy of rational adults, and increasingly of capable minors, is a cornerstone of Australia's liberal democratic system.

However, the two opposing approaches to the promotion of the autonomy of incapable minors compete for influence. Each has its merits, and each is supported by sections of the Australian public. The minimalist approach has a higher public profile due to the support of the approach by organised anti-circumcision lobby groups. However, the current regulatory approach in Australia, and in human rights law, seems to tend in form, if not substance, towards a very restrained future orientated consent approach. For example, British Courts applying law very similar to Australian law, have, whilst stating that the justifiability of the decision to circumcise in childhood turns on the facts of the case, as yet refused to authorise the circumcision of a child when the merit of the procedure is disputed by the child's parents, and the circumcision of the child as an incapable minor is deemed to be unlikely to be of much significance in the future (see discussion from page 82).

## **2.6 Naturalism**

The concept of naturalism is commonly linked to autonomy and bodily integrity, so much so, that the term 'naturalism' is often used interchangeably for, or in concert with the terms autonomy and bodily integrity to refer to the same conceptual principle. However, naturalism has a technical meaning distinct from the meaning commonly attributed to autonomy or bodily integrity. This technical meaning is discussed below and is utilised in this thesis.

### **Background: Naturalism**

Naturalism, in its technical sense, is, as Dekkers suggests, body orientated rather than person orientated.<sup>168</sup> Proponents of the concept absolutely oppose all non-therapeutic surgeries.<sup>169</sup> They value maintaining the wholeness or intactness of the human body regardless of the wishes of the person whose body it is. The concept regards the body as something sacrosanct and distinct from the person who inhabits it. Proponents of the concept typically believe that there is 'a moral duty to treat one's own body respectfully, not as a mere piece of property or raw material at the disposal of the person's will.'<sup>170</sup> This conception of naturalism is commonly associated with religious ideas of the body as sacred. The Catechism of the Catholic Church, for example, under the subheading 'bodily integrity', recognises 'directly intended amputations, mutilations, and sterilizations', unless performed for strictly therapeutic reasons, as 'against the moral law'.<sup>171</sup>

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<sup>168</sup> Wim Dekkers, above n 162, 134.

<sup>169</sup> For a broad discussion of naturalism in all its guises see: Margherita Brusa and Y Micheal Barilan, above n 21, 474.

<sup>170</sup> *Ibid.* See also: Gerald McKenny, 'The Integrity of the Body: Critical Remarks on a Persistent Theme in Bioethics' in Mark Cherry (ed), *Persons and their Bodies: Right, Responsibilities, Relationships* (2002) 353.

<sup>171</sup> Catholic Church, above n 16.



### **Concerns: Naturalism**

Proponents of naturalism oppose circumcision absolutely, and their objection to circumcision will, as Margherita Brusa and Y Michael Barilan suggest,<sup>172</sup>

...persist even if it is evident that circumcision is medically neutral and even if the person wishes to be circumcised.

### **Influence: Naturalism**

Only a very small minority of Australians absolutely oppose all non-therapeutic modifications to the body. Proponents of naturalism, although passionate and active in the circumcision debate, are only a small minority group, and will probably not strongly influence a law reformer's consideration of the legal regulation of circumcision.

## **2.7 Concluding Remarks**

This chapter concludes Part I of this thesis. The conceptual influences and background information discussed are used to assess the adequacy of the current law discussed in Part II, and to inform the legal reform proposed in Part III. The next chapter, the first of Part II, analyses the criminal law that applies to circumcision.

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<sup>172</sup> Margherita Brusa and Y Michael Barilan, above n 21, 474.

# Part II

## Analysis

## Chapter 3

# Criminal Responsibility

This chapter considers the application of the criminal law to circumcision. No laws specifically regulate circumcision in Australia. Furthermore, the criminal law in Australia's states and territories is not uniform, and the application of the criminal law to circumcision is not straightforward. However, definitional similarities between the most relevant offences allow for the grouping of these offences into four categories. The chapter begins by discussing the physical and fault elements which must be proved to establish the liability of a circumciser for each of those four categories. Proof of these elements is a necessary but not sufficient condition for establishing a circumciser's criminal liability for a particular offence. The categories of offences discussed are: force simpliciter (e.g. assault), harm offences (e.g. wounding and causing harm/injury), high threshold harm offences (e.g. grievous bodily harm and causing serious harm/injury), and child ill-treatment or abuse offences.

The chapter proceeds to consider the element of unlawfulness and the possible defences relevant to circumcision in regard to the offences discussed. It then identifies when the presence of consent makes an otherwise unlawful circumcision lawful, and discusses when parental authorisation makes an otherwise unlawful circumcision lawful. The application of the law which provides protection from criminal liability for individuals who perform medical or surgical operations is then reviewed. Finally, the criminal liability of an accessory to the performance of an illegal circumcision (e.g. the criminal liability of a parent who instigates an illegal circumcision) is examined.

The overview summary will show that a circumciser, or parent, will not, except perhaps in the most reprehensible of circumstances, be criminally liable for performing a circumcision when an adult, or a child capable of doing so, provides their consent for the procedure. It will also show that there is uncertainty as to whether the consent of a parent for the circumcision of their child (except perhaps in South Australia) is sufficient to allow a circumciser to legally perform the procedure. The chapter concludes by analysing the form and merit of the law having regard to the main conceptual influences acting upon a law reformer.

## 3.1 Force Simpliciter (Assault)

Each Australian legal jurisdiction has the offence of assault.<sup>1</sup> Assault prohibits the application of force simpliciter and is considered the least serious in a spectrum of offences criminalising the application of force. An assault requires proof of the following elements: the direct or indirect application of force to the person of another; and the requirement that the application of force is done intentionally (or recklessly).<sup>2</sup> Every circumcision involves some sort of direct contact, intended by the circumciser. A prosecutor would not find it difficult to establish these elements of an assault on the facts of a circumcision. Generally, the absence of the consent of the person

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<sup>1</sup> *Crimes Act 1900* (ACT) s 26; *Crimes Act 1900* (NSW) s 61; *Criminal Code* (NT) s 188; *Criminal Code* (Qld) s 335; *Criminal Law Consolidation Act 1935* (SA) s 20; *Criminal Code* (Tas) s 184; *Crimes Act 1958* (Vic) s 31; *Criminal Code* (WA) s 313.

<sup>2</sup> Legislative definitions: *Criminal Code* (NT) s 187(a); *Criminal Code* (Qld) s 245; *Criminal Law Consolidation Act 1935* (SA) s 20(1); *Criminal Code* (Tas) s 182; *Crimes Act 1958* (Vic) s 31(2); *Criminal Code* (WA) s 222. Common law definition: *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439.

assaulted is also an element of unlawful assault in each jurisdiction. Because of the complexity in this area of law, the effect of patient consent on a circumciser's criminal liability is discussed in greater detail later in this chapter (see discussion from page 56).

Assault may be charged as either an indictable or a summary offence in each Australian jurisdiction. A heavier maximum penalty for both the criminal and summary offence applies in the Northern Territory if the victim is under the age of 16, and the assailant is an adult.<sup>3</sup> A heavier penalty is available in South Australia if an assault is committed on a person under the age of 12.<sup>4</sup> Heavier penalties, or separate offences with a heavier penalty, are available for assaults in most Australian jurisdictions if the prosecution can prove that the assailant had an intention to either commit a more serious offence, or inflict a particular kind of harm, when they committed the assault.<sup>5</sup>

The offence of indecent assault also exists in each Australian state and territory.<sup>6</sup> An indecent assault is 'an assault accompanied with circumstances of indecency'.<sup>7</sup> The finder of fact is left to determine whether a particular assault was accompanied by indecent circumstances. Indecency is something to be judged against standards of common propriety.<sup>8</sup> The assault itself, or the circumstances of the assault, must have a sexual connotation or character.<sup>9</sup> The fact finder may have reference to the area of the body touched, the motive for the touching, and the context in which the touching took place, to determine whether the assault was committed in indecent circumstances.<sup>10</sup> Circumcision requires extensive handling of the penis, and, in some rarer Jewish circumcision rituals, can involve the mouth of the circumciser being placed on the penis to suck the blood from the wound.<sup>11</sup> However, a finder of fact is unlikely, at least while circumcision is so widely accepted in Australia, to find the circumstances of a typical circumcision indecent. Indeed, the lack of a clear sexual connotation to most circumcisions means that they will probably not be characterised as indecent.

## 3.2 Harm Offences

Each Australian jurisdiction has an offence which criminalises causing a particular type of harm to another person. Two forms of harm offence operate in Australia. They are wounding offences, and non-wounding harm/injury offences. Heavier penalties are available in some jurisdictions when the person harmed is under a particular age.<sup>12</sup>

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<sup>3</sup> *Criminal Code* (NT) s 188(2)(c).

<sup>4</sup> *Criminal Law Consolidation Act 1935* (SA) ss 20(3)(b), 5AA(1)(e)(ii).

<sup>5</sup> See: *Crimes Act 1900* (ACT) s 22; *Crimes Act 1900* (NSW) s 58; *Criminal Code* (NT) s 193; *Criminal Code* (Qld) s 340(a); *Criminal Law Consolidation Act 1935* (SA) s 270B; *Criminal Code* (Tas) s 183(a); *Crimes Act 1958* (Vic) s 31(1)(a); *Criminal Code* (WA) s 317A.

<sup>6</sup> *Crimes Act 1900* (ACT) ss 57-61; *Crimes Act 1900* (NSW) s 61L; *Criminal Code* (NT) s 192(4); *Criminal Code* (Qld) s 352; *Criminal Law Consolidation Act 1935* (SA) s 56; *Criminal Code* (Tas) s 127; *Crimes Act 1958* (Vic) s 39; *Criminal Code* (WA) s 323.

<sup>7</sup> *Beal v Kelley* (1951) 2 All ER 763, 764 (Lord Goddard CJ).

<sup>8</sup> See: *R v Harkin* (1989) 38 A Crim R 296; *R v Drago* (1992) 63 A Crim R 59.

<sup>9</sup> *R v Harkin* (1989) 38 A Crim R 296, 301 (Lee CJ).

<sup>10</sup> *R v Harkin* (1989) 38 A Crim R 296, 301 (Lee CJ); *R v Drago* (1992) 63 A Crim R 59, 62 (Nicholson J).

<sup>11</sup> For a description of this practice see: David Biale, *Blood and Belief: The Circulation of a Symbol Between Jews and Christians* (2008) 99; Jamie Kerlee, 'Too Much Religious Freedom? Infants Infected with Herpes after Jewish Mohel Applies Oral Suction to Circumcised Penises' (2004) 19 *Journal of Law and Health* 297.

<sup>12</sup> See for example: *Criminal Law Consolidation Act 1935* (SA) ss 20(4)(b); 5AA(1)(e)(ii).

## Wounding Harm Offences

The offence of wounding exists in each Australian jurisdiction except for the Northern Territory and Victoria.<sup>13</sup> ‘Wound’ has a technical definition at law. The common law definition of wound has been accepted in the criminal code jurisdictions.<sup>14</sup> A leading case in Australia on the definition of wound is *Devine*.<sup>15</sup> Justice Cosgrove in that judgment suggests that for a wound:<sup>16</sup>

The penetration to some degree of the true skin or cutis vera is required. As the true skin contains the blood vessels, any rupture of it will cause bleeding that will evidence its invasion.

In each jurisdiction it is sufficient, but not always necessary, to prove that the defendant intended to cause a wound to establish the required fault element.<sup>17</sup>

Circumcision involves a deep incision into the foreskin.<sup>18</sup> Every circumcision method, even those promoted as being ‘bloodless’, requires the penetration of the cutis vera. Consequently, the performance of a circumcision necessarily involves causing a wound intentionally. If a circumcision went to trial the prosecution could easily prove the physical elements of the offence of wounding.

## Non-Wounding Harm Offences

The Australian Capital Territory and New South Wales have a separate offence for an assault occasioning actual bodily harm.<sup>19</sup> The charge requires the prosecution to prove that the accused committed an assault (see discussion from page 37), and that the assault occasioned bodily harm to the person of another. Bodily harm is given its ordinary meaning in the Australian Capital Territory and New South Wales. Case law suggests that an injury must be more than merely transient or trifling to be classified as bodily harm.<sup>20</sup>

Queensland and Western Australia also have an assault causing bodily harm provision.<sup>21</sup> In these jurisdictions bodily harm means:<sup>22</sup>

any bodily injury which interferes with health or comfort.

Rather than a separate offence, the Northern Territory has a heavier penalty for a common assault when the complainant suffers harm during an assault.<sup>23</sup> Harm is not defined exhaustively in the

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<sup>13</sup> *Crimes Act 1900* (ACT) s 21; *Crimes Act 1900* (NSW) s 35; *Criminal Code* (Qld) s 323(1); *Criminal Law Consolidation Act 1935* (SA) s 23; *Criminal Code* (Tas) s 172; *Criminal Code* (WA) s 301.

<sup>14</sup> See: *R v Jervis* (1991) 56 A Crim R 374.

<sup>15</sup> *R v Devine* [1982] 8 A Crim R 45.

<sup>16</sup> *R v Devine* [1982] 8 A Crim R 45, 55 (Cosgrove J). See also: *Vallance v R* (1961) 108 CLR 56, 77 (Windeyer J).

<sup>17</sup> The fault or mental element of the offence of wounding may differ between Australian jurisdictions. In Tasmania the assailant must have foreseen that causing a wound was a possible consequence of their conduct, see: *Vallance v R* (1961) 108 CLR 56. In other jurisdictions it seems that the assailant is only required to have foreseen the possibility that their actions might cause some physical harm, but not specifically a wounding, see: *R v Mowatt* [1968] 1 QB 421.

<sup>18</sup> As an interesting aside, there is English precedent that suggests a laceration to the urethra is a wound, see: *R v Waltham* (1849) 3 Cox CC 442.

<sup>19</sup> *Crimes Act 1900* (ACT) s 24; *Crimes Act 1900* (NSW) s 59.

<sup>20</sup> *R v Donovan* [1934] 2 KB 498, 509 (Swift J).

<sup>21</sup> *Criminal Code* (Qld) s 339(1); *Criminal Code* (WA) s 317.

<sup>22</sup> *Criminal Code* (Qld) s 1 “Bodily Harm”; *Criminal Code* (WA) s 1(1) “Bodily Harm”.

Northern Territory. The Northern Territory *Code* provides that harm includes pain, and any physical contact with a person that a person might reasonably object to in the circumstances, whether or not the person was aware of it at the time.<sup>24</sup>

Many states have harm or injury offences which do not require the prosecution to first prove an assault. South Australia and the Northern Territory have the offence of causing harm.<sup>25</sup> In South Australia and the Northern Territory harm is defined within legislation and its definition includes ‘physical harm’ which includes pain.<sup>26</sup> The Australian Capital Territory has the offence of inflicting actual bodily harm.<sup>27</sup> Victoria has the offence of ‘causing injury’. ‘Injury’ is defined in the Victorian legislation as including ‘pain’.<sup>28</sup>

Circumcision involves a bodily injury, caused by an assault, which interferes with comfort, is painful, is more than transient or trifling, and which certainly might be reasonably objected to. The harm caused by a circumcision, albeit a negligently performed circumcision that required further medical attention, has previously been characterised as bodily harm in Canada. Canada utilises a definition of bodily harm equivalent to that used under common law. Justice Allan commented in the British Columbia Supreme Court case of *R v DJW* that:<sup>29</sup>

DJ [The circumcised child] suffered bodily harm: his penis bled at the time of the circumcision and later that night, and it was obviously painful as he cried on both occasions....

In this case, DJ was clearly hurt when his father cut his foreskin – he cried at the time of the circumcision and later that night when the cut opened and bled. There was obviously considerable interference with DJ’s comfort for a number of days. DJ was immobilized wholly or partially for a few days. I accept Dr. Afshar’s evidence that surgery was necessary to repair the damage or injury that the accused had done to DJ’s penis and to prevent the likely disfigurement. I would not characterize the injury as merely transient or trifling.

The fault element of each of the harm offences discussed in this section could easily be established at trial. The requisite harm is an inherent part of a properly performed circumcision procedure. A prosecutor would have little difficulty in establishing that the harm was intended.

### 3.3 High Threshold Harm Offences

Each jurisdiction in Australia has at least one offence which requires proof of a high threshold of harm. These offences differ between jurisdictions in their name, and the elements they require to establish the offence. This section focuses on the physical elements of the various offences. The fault or mental element of the high threshold harm offences ought not to be in dispute if the requisite harm of the offence is established by the procedure performed. This is because a circumciser ordinarily performs the procedure with full knowledge that the procedure will result in the harm required by the particular offence.

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<sup>23</sup> *Criminal Code* (NT) s 188(2)(a).

<sup>24</sup> *Criminal Code* (NT) s 1A(2).

<sup>25</sup> *Criminal Law Consolidation Act 1935* (SA) s 24; *Criminal Code* (NT) s 186.

<sup>26</sup> *Criminal Law Consolidation Act 1935* (SA) s 21 “Harm”; *Criminal Code* (NT) s 1A(2).

<sup>27</sup> *Crimes Act 1900* (ACT) s 23.

<sup>28</sup> *Crimes Act 1958* (Vic) s 15.

<sup>29</sup> See: *R v DJW* (2009) BCSC 1397 (Unreported, Allan J, 14 October 2009) [129]-[131].

Most high threshold harm offences can be established in more than one way. The similar ways of establishing the offences are grouped together in this section, using the high threshold harm offence in Queensland as a point of reference to reduce overlap in discussion. In Queensland grievous bodily harm means:<sup>30</sup>

- 1) Any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life; or
- 2) any bodily injury of such a nature that, if left untreated, would be likely to cause permanent injury to health; or
- 3) serious disfigurement; or
- 4) the loss of a distinct part or an organ of the body.

The definitions in other jurisdictions loosely correspond with one or more of Queensland's definitions. The four parts of Queensland's definition will be used as sub-headings to group the discussion of similar definitions operating elsewhere in Australia. The Queensland definition does not include the traditional meaning of grievous bodily harm, ie. 'serious harm', which still exists at common law, and continues to be used in some Australian jurisdictions. Consequently, the inclusion of the following sub-heading is required to cover the field of high threshold harm offences which operate in Australia.

- 5) Serious harm.

Most Australian high threshold harm offences provide for a heavier penalty if intention, rather than recklessness can be proved.<sup>31</sup> Heavier penalties are also available in some jurisdictions when the person harmed is under a certain age.<sup>32</sup>

### **1) Any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life**

In South Australia and the Northern Territory the relevant legislation utilises the terminology of 'serious harm' rather than grievous bodily harm. In those jurisdictions serious harm includes any: 'harm that endangers, or is likely to endanger a person's life'.<sup>33</sup> Tasmania and Western Australia also utilise a very similar meaning of grievous bodily harm to the first meaning of grievous bodily harm in Queensland. In these jurisdictions grievous bodily harm can mean: 'any bodily injury of such a nature as to endanger, or be likely to endanger life...'.<sup>34</sup> 'Likely' is given its ordinary meaning. The meaning has been explained by the courts as a substantial or real chance, which is distinct from a mere possibility or a remote chance.<sup>35</sup> Although death is a possible complication of circumcision, a jury will almost certainly not classify the possibility of death occurring from

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<sup>30</sup> *Criminal Code* (Qld) s 1 "Grievous Bodily Harm".

<sup>31</sup> See: *Crimes Act 1900* (ACT) ss 19, 20; *Crimes Act 1900* (NSW) ss 33, 35; *Criminal Code* (NT) ss 177, 174D; *Criminal Code* (Qld) ss 317, 320; *Criminal Law Consolidation Act 1935* (SA) ss 23; *Criminal Code* (Tas) ss 170, 172; *Crimes Act 1958* (Vic) ss 16, 17; *Criminal Code* (WA) ss 294, 297.

<sup>32</sup> See for example: *Criminal Law Consolidation Act 1935* (SA) s 23(1)(b).

<sup>33</sup> *Criminal Code* (NT) s 1 "Serious Harm" (a); *Criminal Law Consolidation Act 1935* (SA) s 14(4) "Serious Harm" (a).

<sup>34</sup> *Criminal Code* (Tas) s 1 "Grievous Bodily Harm"; *Criminal Code* (WA) s 1 "Grievous Bodily Harm".

<sup>35</sup> *Boughey v R* (1986) 161 CLR 10, 21 (Mason, Wilson and Deane JJ).

the circumcision of a healthy male, of any age, as likely in the sense of there being a substantial chance of it occurring.<sup>36</sup>

**2) Any bodily injury of such a nature that, if left untreated, would be likely to cause permanent injury to health**

In Western Australia grievous bodily harm can also mean any bodily injury of such a nature to cause, or be likely to cause, permanent injury to health.<sup>37</sup> Tasmania's definition is similar but differs subtly from Western Australia's and Queensland's by referring to the presence of a 'serious', rather than 'permanent' injury to health.<sup>38</sup>

The meaning of 'health', in the context of the definition of grievous bodily harm in a criminal code, has been previously considered by the Supreme Court of Queensland. Justice de Jersey suggested there:<sup>39</sup>

that the concept of health, as ordinarily understood, covers the functioning of the body, and in relation to that, freedom from disease or ailment, and that it does not extend to the presence within the body of organs or parts which perform no function, the absence of which causes no disease or ailment.

It was stressed, providing the loss of part of the outer ear as an example, that: 'it is very doubtful that the removal of a part of the body that performs no useful function would be described as an injury to health.'<sup>40</sup>

In South Australia one of the meanings of 'serious harm' is similar to the meaning attributed to 'health' by the Queensland Supreme Court. In South Australia 'serious harm' includes:<sup>41</sup>

harm that consists of, or results in, serious and protracted impairment of a physical or mental function;

It seems that a fact finder considering whether a circumcision is an injury to health (or serious harm in South Australia) would have to consider whether the loss of the foreskin results in the loss of bodily function. The precise function or functions of the foreskin and whether its existence is beneficial to health, has long been a significant area of debate. The foreskin's function was considered above (see discussion from page 17). Whether a jury will accept that the foreskin has a particular function, so that its removal will always be injurious to health, is difficult to predict. However, a finder of fact is probably unlikely to find the excision of a male's foreskin to be likely to cause a disease or an ailment which permanently impairs a physical function.

The Tasmanian *Criminal Code* requires a 'serious', rather than permanent injury to health,<sup>42</sup> and the South Australian provision refers to 'serious and protracted impairment of a physical or

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<sup>36</sup> One study reported that no deaths occurred during 500,000 circumcisions, see: Lowell King, 'Neonatal Circumcision in the United States in 1982' (1982) 128 *Journal of Urology* 1135. However, deaths are a known complication of circumcision, see: Jacqueline Scurlock and Patrick Pemberton, 'Neonatal Meningitis and Circumcision' (1977) *Medical Journal of Australia* 332; Paediatric Death Review Committee: Office of the Chief Coroner of Ontario, 'Circumcision: A Minor Procedure?' (2007) 12 *Paediatric Child Health* 311.

<sup>37</sup> *Criminal Code* (WA) s 1 "Grievous Bodily Harm".

<sup>38</sup> *Criminal Code* (Tas) s 1 "Grievous Bodily Harm".

<sup>39</sup> *Tranby v R* [1992] 1 Qd R 432, 422.

<sup>40</sup> *Tranby v R* [1992] 1 Qd R 432, 438 (Derrington J).

<sup>41</sup> *Criminal Law Consolidation Act 1935* (SA) s 21 "Serious Harm" (b).

<sup>42</sup> *Criminal Code Act* (Tas) s 1 "Grievous Bodily Harm".



mental function’.<sup>43</sup> The prosecution in these jurisdictions may find it particularly difficult to establish that losing part of the foreskin causes a ‘serious’ impairment of physical function, or that the procedure is likely to result in such an injury, as it would be required to do.<sup>44</sup>

### 3) Serious disfigurement

In New South Wales and the Australian Capital Territory the meaning of grievous bodily harm includes ‘any permanent or serious disfiguring of the person’.<sup>45</sup> In South Australia one of the meanings of ‘serious harm’ is ‘harm that consists of, or results in, serious disfigurement’.<sup>46</sup> In the Northern Territory ‘serious harm’, can also mean any disfigurement that is, or is likely to be ‘significant and longstanding’.<sup>47</sup> The Northern Territory is the only jurisdiction to explicitly refer to a necessary duration for the disfigurement. However, South Australia’s Attorney General, during the Second Reading Speech of the South Australian provision, suggested that: ‘...“serious disfigurement” would mean an “enduring disfigurement”’.<sup>48</sup> However, case law suggests that the disfigurement would not need to be permanent in South Australia.<sup>49</sup> It also seems open for finders of fact in other jurisdictions to find transient disfigurements as lacking the required seriousness to establish the charge.

A separate offence with a heavier penalty for acts intended to cause grievous bodily harm exists (along with the offence of causing grievous bodily harm) in Queensland, Tasmania and Western Australia. The offence does not require grievous bodily harm to be caused. The prosecution can establish the offence by proving a person caused a wound to another with the intent to disfigure them.<sup>50</sup> A circumcision necessarily involves a wound (see discussion from page 38).

‘Disfigure’ or ‘disfigurement’ has not been defined authoritatively by legislation or any criminal case law in Australia. The ordinary meaning of disfigure is to: ‘mar the figure, appearance, or beauty of; deform; deface, mar the effect or excellence of’.<sup>51</sup> The Tasmanian Supreme Court has suggested that the word disfigure means ‘to do some external injury which may detract from a man’s personal appearance’.<sup>52</sup> Queensland’s *Supreme and District Court Benchbook* suggests that the term:<sup>53</sup>

Serious disfigurement requires an examination of the cosmetic result of the injury; not every disfigurement will have an effect which merits such a description. The jury are considering whether or not the injury would have a serious undesirable or negative result on the person injured.

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<sup>43</sup> *Criminal Law Consolidation Act 1935* (SA) s 21 “Serious Harm” (b).

<sup>44</sup> See also: *Wayne* (1992) 62 A Crim R 1. The case is precedent from the Northern Territory for the proposition that a cosmetic deformity may still be an injury to health when it causes an immediate, albeit temporary injury to health (in that case injuries to the victim’s face temporarily affected the bodily functions of chewing, speaking, and seeing).

<sup>45</sup> *Crimes Act 1900* (ACT) s 4 “Grievous Bodily Harm”; *Crimes Act 1900* (NSW) s 4(1) “Grievous Bodily Harm”.

<sup>46</sup> *Criminal Law Consolidation Act 1935* (SA) s 21 “Serious Harm” (c).

<sup>47</sup> *Criminal Code* (NT) s 1 “Serious Harm” (b).

<sup>48</sup> South Australia, *Parliamentary Debates*, House of Assembly, 9 December 2004, 1312 (Michael Atkinson, Attorney General).

<sup>49</sup> *R v Wilkinson* [2008] SASC 172 (Unreported, Gray, Sulan and White JJ, 4 July 2008).

<sup>50</sup> *Criminal Code* (Qld) s 317; *Criminal Code* (Tas) s 170; *Criminal Code* (WA) s 294.

<sup>51</sup> Arthur Delbridge et al (eds), *The Macquarie Dictionary: Australia’s National Dictionary* (2001) 545.

<sup>52</sup> *Arthur v Arthur* [1964] ALR 1021, 1025 (Gibson J).

<sup>53</sup> *Supreme and District Court Benchbook: Update June 2010* (2010) 114.

Thus, it seems that a disfigurement is likely to be given its ordinary meaning as an external injury that detracts from the appearance of a person. It is unclear whether the finder of fact must determine whether there was a disfigurement objectively, i.e. without reference to the particular beliefs of the person harmed. Previous cases have held that a nick out of a person's nostril along with easily noticeable facial scarring,<sup>54</sup> the loss of part of the ear,<sup>55</sup> and marks left in a person's thigh from a shotgun wound,<sup>56</sup> have been sufficient to establish the existence of a serious disfigurement.

Circumcision involves a permanent alteration to the appearance of a male. This alteration includes a partial amputation and scarring of an external body part. The fact finder has to determine whether the alteration detracts from the person's appearance. It is open for fact finders to consider circumcision an improvement, or perhaps an inconsequential change, rather than a defacing or marring of the appearance of a person. However, it is equally open for them to find circumcision to be a disfigurement. The question involves a value judgment. In any case, the prosecution in Queensland and South Australia may find it difficult to prove that a circumcision is a 'serious' disfigurement as they are required to do in these jurisdictions. The prosecution in the Northern Territory may also find it slightly harder to prove that a well performed circumcision results in a 'significant' disfigurement.

#### **4) The loss of a distinct part or an organ of the body**

The final meaning of grievous bodily harm in Queensland is unique to that jurisdiction. The terminology was included, along with serious disfigurement, in response to a Queensland Supreme Court decision which held that the partial loss of a person's ear lobe was not grievous bodily harm. Cases have suggested the loss of part of a finger,<sup>57</sup> and the loss of a tooth,<sup>58</sup> as examples of the loss of a distinct part of the body. It is difficult to predict whether the foreskin, or a part of it, will be characterised as a distinct part of the body. It is open for the fact finder to determine that the foreskin is a distinct part of the human body.

#### **5) Serious harm**

The high threshold harm offence in the Australian Capital Territory and New South Wales is grievous bodily harm.<sup>59</sup> Grievous bodily harm is given its ordinary meaning in those jurisdictions, and juries are usually given considerable discretion when interpreting the term. However, juries may be directed that the term means: a serious injury; or harm of a serious nature.<sup>60</sup> Directions to the jury do not need to stress that the injury be permanent, or life threatening.<sup>61</sup> There is conflicting authority as to whether a jury should be directed that the injury must be 'really serious'.<sup>62</sup>

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<sup>54</sup> *R v Berryman* [2005] QCA 471 (Unreported, Williams JA, Helman and Chesterman JJ, 16 December 2005).

<sup>55</sup> *R v Kaufusi* [2005] NSWCCA 434 (Unreported, McClellan CJ, Hislop and Rothman JJ, 14 December 2005). See also: *Tranby v R* [1992] 1 Qd R 432.

<sup>56</sup> *R v Wing* [2007] QCA 138 (Unreported, de Jersey CJ, Keane JA and Lyons J, 20 April 2007).

<sup>57</sup> *R v Mundraby* [2004] QCA 493 (Unreported, Mackenzie J, McPherson and Jerrard JA, 23 December 2004).

<sup>58</sup> *R v Stuart* [2005] QCA 138 (Unreported, McMurdo P, Keane JA and Philippides J, 3 May 2005).

<sup>59</sup> *Crimes Act 1900* (ACT) ss 19, 20, 25; *Crimes Act 1900* (NSW) ss 35, 54.

<sup>60</sup> *DPP v Smith* [1961] AC 290, 334 (Lord Kilmuir).

<sup>61</sup> *R v Bollom* [2004] 2 Cr App R 50; *R v Griffiths* [1999] 103 A Crim R 291.

<sup>62</sup> *R v Perks* (1986) 41 SASR 335; *R v Blevins* (1988) 48 SASR 65. Compare with: *R v Janjua and Choudhury* [1999] 1 Cr App R 91.

In Victoria the offence of grievous bodily harm has been replaced with the offence of causing serious injury.<sup>63</sup> Serious injury is given its ordinary meaning in Victoria. Consequently there is little difference in the law between Victoria, the Australian Capital Territory and New South Wales. Although it is open for the fact finder to find that a circumcision results in ‘serious’ harm/injury, it seems unlikely that they will classify such a common and relatively minor procedure as one which causes serious or grievous injury or harm.

The Northern Territory also uses the terminology of serious harm.<sup>64</sup> ‘Serious harm’ is defined by legislation in the Northern Territory and can mean: ‘any harm that is, or is likely to be significant and longstanding.’<sup>65</sup> Permanency is not required by the Northern Territory definition.<sup>66</sup> There is no guidance in the legislation, case law, or the second reading speech to illuminate the difference between the terminology of serious harm used in the Northern Territory (i.e. significant and longstanding harm) and serious harm at common law. Northern Territory courts have previously, although not in a criminal law context, given the terms ‘significant and longstanding’ their ordinary meaning as harm that is ‘of consequence’ and ‘occurring for a long time’.<sup>67</sup>

Serious harm, the threshold which is required at common law, certainly appears to be a more stringent test than significant harm which is required under the Northern Territory’s *Criminal Code*. A finder of fact is more likely to find the initial wound of a circumcision significant than they are to find it serious. However, the relatively low threshold of harm (significant) for the serious consequence offence is tempered in the Northern Territory by the requirement that the harm also be longstanding. It is quite likely that a prosecutor will be able to establish the initial wound of a circumcision as significant harm. Few people would doubt that the pain of an excision of genital tissue is of consequence. However, the harm from the initial wound is not particularly longstanding. Conversely, it might be argued that the harm of a healed circumcision is longstanding, but may not be as likely to be thought of as significant by a fact finder. However, the question is one which will have to be determined by the finder of fact in the particular circumstances of the case.

### 3.4 Abuse and Ill-treatment of the Child

Several of Australia’s states and territories have enacted at least one offence with the object of preventing and punishing cruelty to children. These offences, although differing subtly from jurisdiction to jurisdiction, come in two general forms, these are: older ill-treatment offences, which were modelled on similar offences operating in England since at least 1889;<sup>68</sup> and suffering harm offences which are included in modern child protection legislation. Each type of offence is discussed in turn below.

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<sup>63</sup> *Crimes Act 1958* (Vic) s 16.

<sup>64</sup> *Criminal Code* (NT) s 181.

<sup>65</sup> *Criminal Code* (NT) s 1 “Serious Harm” (b).

<sup>66</sup> Northern Territory, *Parliamentary Debates*, House of Representatives, 5 May 2005, 64 (Peter Hoyne, Attorney General).

<sup>67</sup> *Noteboom v Northern Territory of Australia* [2008] NTMC 060 (Unreported, Trigg SM, 4 September 2008).

<sup>68</sup> See: *Prevention of Cruelty to, and Protection of, Children Act 1889* (UK) 52 & 53 Vict, c 44, s 1; *Prevention of Cruelty Act 1894* (UK) 57 & 58 Vict, c 41, s 1; *Prevention of Cruelty to Children Act 1904* (UK) 4 Edw 7, c 15, s 1; *Children Act 1908* (UK) 8 Edw 7, c 67, s 12(1); *Children and Young Persons Act 1933* (UK) 23 & 24 Geo 5, c 12, s 1.

### Ill-treatment Offence

Tasmania's *Criminal Code* and Queensland's *Children's Services Act 1965* each contain a provision which criminalises the ill-treatment of children. The two offences are very similar in wording. Section 178(1) of the Tasmanian *Criminal Code* provides:<sup>69</sup>

Any person over the age of 14 years who, having the custody, care, or control of a child under the age of 14 years, wilfully ill-treats, neglects, abandons, or exposes such child, or causes such child to be ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering or injury to health, is guilty of a crime.

The Queensland offence uses the word 'charge' rather than 'custody, care or control'; does not place a specific age limit on who may be an offender, or a victim; refers to 'physical or mental health' rather than 'health' simpliciter; and does not contain the term 'wilful'.<sup>70</sup> The two provisions use the same terminology in all other relevant ways.

The words 'custody', 'care', 'charge' and 'control' are usually associated with the powers of parents or guardians. They clearly allow for the *prima facie* application of the provision to parents who treat their child with cruelty.<sup>71</sup> There is less certainty as to whether the provision may have an application to a person other than a guardian, such as a circumciser, or any other person involved in a circumcision.

The prosecution must establish that the child was ill-treated. Ill-treatment is not defined in legislation, has not acquired a technical meaning at common law, and is given its ordinary meaning in England.<sup>72</sup> There is legal authority for the proposition that a single act is capable of constituting ill-treatment.<sup>73</sup> The prosecution must establish that the ill-treatment was likely to cause the child 'unnecessary suffering' or 'an injury to health'. The term health is discussed above (see discussion from page 42). There is no guidance within statute or case law as to what 'unnecessary suffering' may include. Suffering is likely to be given its ordinary meaning, perhaps as something bad or unpleasant, or involving pain or distress. There is no guidance on when suffering is likely to be deemed either necessary or unnecessary.

Authority from overseas, suggests that the ill-treatment offences in Queensland and Tasmania require the prosecution to prove that the accused inflicted the ill-treatment deliberately with a conscious appreciation that it was likely to cause unnecessary suffering or an injury to health.<sup>74</sup> The term 'wilfully' is usually taken in Australia as requiring subjective recklessness, so that the person who ill-treated the children did so intending to cause, or, knowing and being reckless to the likelihood of causing, the child unnecessary suffering or an injury to health.<sup>75</sup>

A lower court in Queensland has previously held that the jurisdiction's ill-treatment provision requires the prosecution to establish that the offender had a bad intent, malice or unkindness,<sup>76</sup> so

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<sup>69</sup> *Criminal Code* (Tas) s 178(1).

<sup>70</sup> *Children's Services Act 1965* (Qld) s 69(1).

<sup>71</sup> A parent's criminal liability appears to include allowing harm to be caused to their child by a third party, see: *R v Conner* (1908) 2 KB 26.

<sup>72</sup> *R v Newington* (1990) 91 Cr App R 247.

<sup>73</sup> *R v Accused* [1994] DCR 883.

<sup>74</sup> *R v Hende* [1996] 1 NZLR 153.

<sup>75</sup> See for example: *Lockwood, Ex Parte Attorney-General* [1981] Qd R 209; *Hodgson v The Queen* [1985] Tas R 75.

<sup>76</sup> *H v M* (Unreported, Ipswich Magistrates Court, Magistrate Gordon, 24 July 1998). For a discussion of the case see: Andrew West, 'Ill treatment of Children' (1999) 20 *Queensland Lawyer* 38, 39.

that any course of conduct accepted as reasonable in society, such as light corporal punishment, performed with the child's interests, betterment or well being in mind, cannot be considered ill-treatment.<sup>77</sup> However, there is significant uncertainty in the application of this area of law to circumcision. This uncertainty cannot be clarified until the matter is considered by a court.

## Child abuse

New South Wales, Tasmania, Victoria, and Western Australia have child cruelty offences within their child protection legislation. In Tasmania s 91 of the *Children, Young Persons and Their Families Act 1997* (CYPTFA) provides:<sup>78</sup>

(1) A person who has a duty of care in respect of a child must not intentionally take, or fail to take, action that could reasonably be expected to result in –

(a) the child suffering significant harm as a result of physical injury or sexual abuse; or

(b) the child suffering emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged; or

(c) the child's physical development or health being significantly harmed.

The child cruelty provisions in Victoria and New South Wales are similar to, but have a slightly wider scope than the provision in Tasmania. In New South Wales the offender does not need to be in a special relationship with the child, and, in both New South Wales and Victoria, the prosecution only has to show that the offender's act resulted in, or was likely to result in, the requisite harm.<sup>79</sup>

The Western Australian provision differs from the Tasmanian provision in several subtle ways: first, the offender must be in 'care or control' of the child; second, the offender must engage in physical, emotional, sexual or psychological abuse; and third, the offender must have known or have been reckless as to whether his abusive conduct may result in the child suffering harm.<sup>80</sup> 'Harm', in the Western Australia provision, includes harm to the child's physical, emotional or psychological development.<sup>81</sup> It would be sufficient for the prosecution to establish that the offender foresaw the requisite harm as a likely result of their conduct to establish the mental element for each of the offences in the four states.

In Tasmania and Victoria proceedings may only be brought after consultation with the Secretary of the relevant child services department.<sup>82</sup> The Secretary in Tasmania may choose not to initiate any action if:<sup>83</sup>

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<sup>77</sup> Andrew West, above n 76, 39.

<sup>78</sup> *Children, Young Persons and Their Families Act 1997* (Tas) s 91.

<sup>79</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 227; *Children, Youth and Families Act 2005* (Vic) s 493.

<sup>80</sup> *Children and Community Services Act 2004* (WA) s 101.

<sup>81</sup> *Children and Community Services Act 2004* (WA) s 3 "Harm".

<sup>82</sup> *Children, Young Persons and Their Families Act 1997* (Tas) s 91(2); *Children, Youth and Families Act 2005* (Vic) s 493 (2).

<sup>83</sup> *Children, Young Persons and Their Families Act 1997* (Tas) s 17.

proper arrangements exist for the care and protection of the child and the matter of the apparent abuse or neglect or the likelihood of the child being killed or abused or neglected has been or is being adequately dealt with.

In exercising their power, the Tasmanian Secretary is required to give serious consideration to 'preserving and enhancing the child's sense of ethnic, religious or cultural identity, and making decisions and orders that are consistent with ethnic traditions or religious or cultural values.'<sup>84</sup> The child protection legislation in Tasmania and New South Wales place a time limit on when an action for child abuse may be commenced.<sup>85</sup>

It is for the finder of fact to determine whether a particular circumcision was an act of physical injury or abuse which resulted in significant harm (or just harm in Western Australia). This finding is potentially open.

### 3.5 The Effect of Consent

Consent of the person assaulted or harmed can, in some circumstances, make an act which would otherwise be unlawful lawful in certain circumstances. However, the law on the effect of consent is not uniform in Australia. There are significant and often overlooked differences in this area of law between Australia's different jurisdictions. This section discusses the effect of consent on a criminal prosecution for the offences just discussed.

#### The Meaning of Consent

Consent, although key to the successful prosecution of many offences, is not a clearly defined criminal law term. Tasmania is the only jurisdiction which provides a legislative definition of consent for non-sexual offences. The Tasmanian *Criminal Code* defines consent in s 2A(1) as 'free agreement'.<sup>86</sup> Section 2A(2) of the Tasmanian *Code* also provides, without limiting what is free agreement, a non-exhaustive list of circumstances where free agreement is not present.<sup>87</sup> The common law does not provide a detailed or settled definition of consent. The *Macquarie Dictionary* definition of consent is 'to give assent; agree; comply; or yield'.<sup>88</sup> Decisions in South Australia and New South Wales have suggested that consent must be 'free and voluntary'.<sup>89</sup> However, these judgments have been criticised.<sup>90</sup> The New South Wales *Criminal Trial Courts Bench Book* suggests, in the context of sexual offences, that 'consent involves conscious and voluntary permission'.<sup>91</sup>

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<sup>84</sup> *Children, Young Persons and Their Families Act 1997* (Tas) s 8(2)(b)(v).

<sup>85</sup> *Children, Young Persons and Their Families Act 1997* (Tas) s 109; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 258A.

<sup>86</sup> *Criminal Code* (Tas) s 2A(1).

<sup>87</sup> *Criminal Code* (Tas) s 2A(2).

<sup>88</sup> Arthur Delbridge et al (eds), above n 51, 413.

<sup>89</sup> *Question of Law Reserved on Acquittal Pursuant to Section 350 (1a) Criminal Law Consolidation Act (No. 1 of 1993)* (1993) 59 SASR 214; *R v Clark* (Unreported, New South Wales Court of Criminal Appeal, Simpson J, 17 April 1998).

<sup>90</sup> *R v Mueller* [2005] 62 NSWLR 476.

<sup>91</sup> *Criminal Trial Courts Bench Book* (2010) [5-1550]. See also: *R v Clark* (Unreported, New South Wales Court of Criminal Appeal, Simpson J, 17 April 1998).

## The Capacity of Minors to Provide Consent

In Tasmania, a person, including a minor, does not freely agree for the purposes of consent if they do not say or do anything to communicate consent.<sup>92</sup> There is no equivalent legislative provision applicable to consent to non-sexual offences in any other Australian jurisdiction. However, the presence or absence of actions or words which indicate a particular act is consensual will ordinarily be a matter that a fact finder will consider when determining whether consent was given. The result of this is that infants, and the very young, who are incapable of indicating, or do not indicate, their consent by words or actions, will ordinarily not be found to have consented in any Australian jurisdiction.

Furthermore, a basic understanding of the physical act which is being agreed to is the cornerstone of consent. A minor is unable to provide a valid consent in any Australian jurisdiction when they are unable to understand the nature of the act.<sup>93</sup> The term 'nature of the act' is usually accepted in the criminal law to mean only a general understanding of the physical act which constitutes the physical element of the offence. Thus, for a charge of assault, it would seem that a child would merely have to understand what an application of force was, and where such an application would be applied during a circumcision. For a charge of wounding, a child would only have to understand what a wound was, and where it would occur during a circumcision. Infants, and the very young, will be completely unable to provide consent because they are incapable of forming this understanding.

Courts have occasionally seemed reluctant to apply the law strictly when it is a minor who is consenting to harm. The English decision of *Burrell v Harmer*,<sup>94</sup> which involved the conviction of a man for assault causing actual bodily harm for tattooing two boys, is indicative of this. The court held that the boys did not provide a valid consent because they did not understand the nature of the act. However, it is likely that the two boys, aged 12 and 13 at the time, would have been able to understand the physical nature of the act of getting a tattoo.<sup>95</sup> It may be that the court considered that a valid consent could not have been given unless the minors understood the wider significance and circumstances of getting a tattoo. The decision may implicitly indicate an uneasiness of the court about allowing a minor to give a valid consent to a harmful act, even in circumstances where a minor understands the basic nature of the physical act of the offence, when they do not understand the wider effect, context, or significance of the act. The decision may also, or perhaps in the alternative, reflect the unwillingness of courts to allow consent to be a defence to harm caused in circumstances considered to be injurious to the public, ie. outside the realm of behaviour considered acceptable by the public (see discussion from page 51). The court may have considered the tattooing of the minors to be injurious to the public.

## Circumstances which Affect the Validity of a Consent

Circumcisions are performed in a variety of circumstances, by and for people with a variety of motivations. Each Australian jurisdiction makes a distinction between a valid consent and an agreement not amounting to consent (or a consent made in circumstances which make the consent

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<sup>92</sup> *Criminal Code* (Tas) s 2A(2)(a).

<sup>93</sup> For Tasmania see: *Criminal Code* (Tas) s 2A(2)(i). See also: *R v Roden* (1981) 4 A Crim R 166. For the common law see: *R v Flattery* [1877] 2 QBD 410; *R v Williams* [1923] 1 KB 340. It may also be open for a finder of fact in the criminal codes jurisdictions to determine that a consent without sufficient understanding is no consent at all.

<sup>94</sup> *Burrell v Harmer* [1967] Crim LR 169.

<sup>95</sup> For an analysis of this decision see: Maria Wilson, 'Assault in Medical Law: Revisiting the Boundaries of Informed Consent to Medical Treatment in South Africa' (2009) 16 *Journal of Law and Medicine* 862, 865-866.

irrelevant). The circumstances of an agreement or consent will be more contentious in some circumstances than in others. The following discussion provides a few examples of circumstances in which a fact finder is likely to hold that a given consent is invalid or irrelevant.

Consent is not valid in any Australian jurisdiction when the complainant acquiesces due to actual force, or threats of force.<sup>96</sup> A person, including a child, does not provide a valid consent to a circumcision if force, or the threat of force, is used to procure the consent. In Tasmania it is clear that threats of any other kind, to the person consenting or a third person, will also prevent a finder of fact from concluding that a valid consent was given. The position in Tasmania is the same in the Northern Territory in regard to consent to assault.<sup>97</sup> It is less clear whether violence, threats of force directed at a third party, or threats of a non-violent kind, negate consent at common law.<sup>98</sup> Although the problem of forced circumcisions are more commonly seen overseas than they are in Australia there have been some reports of the use of violence, and threatening behaviour, to coerce Australian boys to be circumcised (see discussion from page 21).

Consent may also be an issue in Tasmania when a circumcision is performed on a person with their agreement although its performance is largely at the behest of a person who is, or has been, in a position of authority over them. Children may be particularly susceptible to external pressures that influence their agreement. Section 2A(2)(e) of the Tasmanian Code provides that there is no free agreement when a person: 'agrees or submits because he or she is overborne by the nature or position of another person.'<sup>99</sup> Circumstances of the sort that may enliven this provision are not unknown in Australia. In 2002, it was reported in the media that a man in Queensland had his two boys, aged five and nine, circumcised against the express wishes of their mother while he had them during a brief access period.<sup>100</sup> Media reports suggested the boys felt misled by their father leading up to the procedure and upset following it.<sup>101</sup> There was no indication in the reports as to whether the boys expressed a desire to undergo the procedure at the time. It was suggested by the boys' mother that the children grew up accepting ill treatment by their father as if they were 'objects or property for him to do with as he pleased'.<sup>102</sup> The overbearing influence of an aggressive or controlling parent is an example of a factor that may affect a child's consent in Tasmania. The extent to which Australia's other jurisdictions, or finders of fact in other jurisdictions, will recognise an effect on the validity of consent of another person's overbearing nature or position is uncertain.<sup>103</sup>

In Tasmania deception or misleading conduct as to the purpose of a circumcision may in some circumstances also provide an avenue to challenge whether a legal consent was given.<sup>104</sup> For example, misleading a person, whether an adult or a child, into thinking a non-therapeutic

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<sup>96</sup> This is settled at common law and is enshrined in Tasmania's Code, see: *Criminal Code* (Tas) s 2A(2)(b)-(c).

<sup>97</sup> *Criminal Code* (NT) ss 187(a), 1 "Menace".

<sup>98</sup> Threats of this sort negate the effect of consent to sexual offences in several jurisdictions, see for example: *Crimes Act 1958* (Vic) s 36B. It is unclear whether the common law is similar as to the effect of such threats on consent to non-sexual offences.

<sup>99</sup> *Criminal Code* (Tas) s 2A(2)(e).

<sup>100</sup> For electronic copies of a collection of news articles recounting the story see: Circumcision Information Australia, *Case Study: Forced Circumcision of Australian Boys: Special Report from Bundaberg* (2002) <<http://www.circinfo.org/ethics.html#bundacastudy>> at 20 October 2010.

<sup>101</sup> Rowland Croucher, *Charges Dropped for Father Who Forced Circumcision on Sons* (2002) John Mark Ministries <<http://jmm.absalom.biz/2003/01/1380/>> at 20 October 2010.

<sup>102</sup> Circumcision Information Australia, above n 100.

<sup>103</sup> The common law has previously recognised the influence 'between close relatives where one may be in a dominant position vis-à-vis the other' as a factor which may affect the validity of a consent, see: *Re T (Refusal of Medical Treatment)* [1992] 4 All ER 649, 665 (Butler-Sloss LJ).

<sup>104</sup> *Criminal Code* (Tas) ss 2A(2)(g), 2A(2)(f).



circumcision is medically necessary, when that is not indicated, may affect the validity of the person's consent in Tasmania. The position in the criminal code states of Western Australia and Queensland as to misrepresentations concerning the purpose of an act is uncertain. These two jurisdictions recognise fraud as a factor negating consent for an assault.<sup>105</sup> However, the courts have not definitively settled whether the term should be given its ordinary meaning, which may include deceptions as to purpose, or whether it should be interpreted in light of the common law in this context.<sup>106</sup>

The common law, which operates in most Australian jurisdictions, and has been enacted in legislation in the Northern Territory,<sup>107</sup> recognises deceit or fraud over the nature of the act, but not the purpose of an act, as affecting the effectiveness of consent to an assault.<sup>108</sup> Only fraud which goes to the nature of the physical act, or to the identity of the defendant, negates the effect of consent at common law. The limitation on fraud to the nature of the act by the common law is explained succinctly by Simon Bronitt in the context of fraudulent medical treatment:<sup>109</sup>

Consent in the criminal law is restricted to an understanding of the physical character of the act, and thus consent to treatment need not require comprehension of its purpose, context or significance.

Fraud relating to the nature of an act (ie. the application of force for an assault, or the particular harm for a harm offence) will be rare in the circumstances of a circumcision. Fraud relating to the nature of an act might arise if a person consents to a circumcision only after they are deceived about the degree, placement, or extent of the application of force (if charged with assault) or the requisite harm (if charged with a harm offence). This kind of fraud may also arise when the person to be circumcised is deceived about who exactly the person to perform the circumcision is.

### **The Limits on What May be Consented to**

There are essentially five different approaches to when consent may protect a circumciser from criminal liability for harm in Australia's eight state and territory legal jurisdictions. These approaches are: the common law (ACT, NSW, Vic), ordinary legislation (SA), modern criminal code (NT), Griffith Code (Qld, WA) and the Stephen Code (Tas). Each approach is discussed in turn below.

The consent of the person assaulted provides a lawful justification for an assault which does not inflict bodily harm in the Australian Capital Territory, New South Wales and Victoria under the common law.<sup>110</sup> However, a circumcision involves bodily harm (see discussion from page 39). There is case law, although largely *obiter dicta*, which suggests without qualification that consent cannot negate a person's liability for a wounding or high threshold harm offence.<sup>111</sup> However,

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<sup>105</sup> *Criminal Code* (Qld) s 245; *Criminal Code* (WA) s 222.

<sup>106</sup> For a Supreme Court judgment which suggests that fraud as a factor negating consent to an assault under the *Queensland Code* may be given a meaning broader than that attributed to it by the common law in the context of consent to assault see: *R v Bas* [2005] QCA 97 (Unreported, Davies and McPherson JJA and Fryberg J, 8 April 2005) [90] (Fryberg J).

<sup>107</sup> *Criminal Code* (NT) s 187(a).

<sup>108</sup> *Papadimitropoulos v R* (1957) 98 CLR 249.

<sup>109</sup> Simon Bronitt, 'Criminal Liability Issues Associated with a "Heroin Trial"' (Working Paper No 13, National Centre for Epidemiology and Population Health, 1995) 34.

<sup>110</sup> *Attorney-General's Reference* (No. 6 of 1980) [1981] QB 715.

<sup>111</sup> See for example: *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 309 (McHugh J); *R v Brown* [1994] 1 AC 212, 248 (Lord Lowry), 280 (Lord Slynn); *Pallante v Stadiums Pty Ltd* [1976] VR 331, 340-341 (McInemey J); *Lergesner v Carroll* [1991] 1 Qd R 206, 219 (Cooper J).

these unqualified pronouncements oversimplify and misstate the common law. There are well established examples, like therapeutic surgery and boxing, where a person's consent to harm, or at least their consent to the chance of being harmed, may provide a lawful justification for even a high threshold harm offence. The common law position on the effect of consent on the lawfulness of harm amounting to bodily harm is that any harm amounting to bodily harm may only be lawfully justified by consent when there is a good reason for the harm caused.<sup>112</sup>

Australian courts have previously recognised that the law in this area involves 'a policy decision rather than the application or exposition of principle'.<sup>113</sup> The common law leaves the finder of fact to decide 'at what point the public interest required consent to be irrelevant' to the determination of lawfulness.<sup>114</sup> English cases have at times referred to the need to protect the 'public interest' or to advance good 'social policy',<sup>115</sup> however the social acceptability of the circumstances of the harm seems to be the determining factor as to whether the reason is 'good' or not.<sup>116</sup> Thus, it seems that a consensual circumcision will be lawful at common law only when the finder of fact believes that the particular circumcision does not deserve the condemnation of the criminal law.

Male circumcision has been recognised in *obiter dicta* as a procedure which is generally approved of by society as lawful.<sup>117</sup> However, circumcisions performed in particularly reprehensible circumstances will probably be regarded as unacceptable and thus unlawful. Circumcisions performed in particularly reprehensible circumstances have been found to be unlawful in other jurisdictions.<sup>118</sup> All the circumstances of the particular procedure may be considered by the finder of fact when determining whether it should be lawful. It seems that the finder of fact must consider whether society generally would have considered the circumcision deserving of the sanction of the criminal law at the time of its performance.

South Australia's *Criminal Law Consolidation Act 1935* partially legislates for the effect of consent on the lawfulness of its harm offences. The definition of assault in South Australia requires the application of force to the person of another 'without the consent' of the person the force is applied to.<sup>119</sup> Thus, it may be that there can be no assault unless the prosecution can prove that the application of force was done without the consent of the person touched. However, the common law limitations on when consent may affect lawfulness may still continue to apply in South Australia. The South Australian legislation stipulates that conduct that is 'justified or excused by law cannot amount to an assault'.<sup>120</sup> The *Act* was not intended to codify the law, and the Second Reading Speech suggests that parliament intended the common law defences to assault to continue to operate.<sup>121</sup> The common law, as it is described above, will probably continue to apply should the ordinary unqualified reading of the South Australian definition of assault, that there can be no assault when there is consent, not be accepted.

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<sup>112</sup> *Attorney-General's Reference* (No. 6 of 1980) [1981] QB 715, 719 (Lane CJ).

<sup>113</sup> *R v Raabe* [1985] 1 Qd R 115, 118 (Connolly J).

<sup>114</sup> *R v Raabe* [1985] 1 Qd R 115, 118 (Connolly J).

<sup>115</sup> *Attorney-General's Reference* (No. 6 of 1980) [1981] QB 715; *R v Wilson* [1996] 2 Cr App Rep 241.

<sup>116</sup> See for example: *R v Brown* [1994] 1 AC 212, 256-275 (Lord Mustill).

<sup>117</sup> See for example: *R v Brown* [1994] 1 AC 212, 231 (Lord Templeton).

<sup>118</sup> See for example: *R v DJW* [2009] BCSC 1397 (Unreported, Allan J, 14 October 2009).

<sup>119</sup> *Criminal Law Consolidation Act 1935* (SA) s 20(1).

<sup>120</sup> *Criminal Law Consolidation Act 1935* (SA) s 20(2)(b).

<sup>121</sup> This is confirmed by the Second Reading Speech: South Australia, *Parliamentary Debates*, House of Assembly, 22 October 2003, 586 (Michael Atkinson, Attorney General).

The interrelationship between consent and the harm and high threshold harm offences is clearer in South Australia than in any other jurisdiction. The South Australian legislation explicitly states that the harm and high threshold harm offences do 'not apply to the conduct of a person who causes harm to another if the victim lawfully consented to the act causing the harm.'<sup>122</sup> The South Australian legislation stipulates that a person may lawfully consent to harm (including serious harm):<sup>123</sup>

... if the nature of the harm and the purpose for which it is inflicted fall within limits that are generally accepted in the community.

The section essentially enacts the common law approach. Consequently, except in the most reprehensible circumstances, the finder of fact will probably be unlikely to hold that a consensual circumcision constituted an unlawful assault, harm or high threshold harm offence in South Australia.

The absence of consent is an element of the definition of assault in Queensland and Western Australia.<sup>124</sup> The absence of consent is not an element of the offence of wounding or grievous bodily harm in these jurisdictions. A plain reading interpretation of the offence provisions suggests that consent is a complete defence to assault and no defence to wounding or grievous bodily harm. This interpretation has been adopted in Queensland. The leading case in Queensland is *Lergesner v Carroll*.<sup>125</sup> The case is authority for the proposition that the consent of the person assaulted, unfettered by policy considerations recognised in the common law, will prevent a successful prosecution for any offence that has assault as one of its elements.<sup>126</sup> As Chief Justice Griffith, who authored the Queensland and Western Australian criminal codes, said in his judgment in *R v Schloss*:<sup>127</sup>

An assault with consent is not an assault at all.

It seems that there will be no finding of fault in Queensland for an offence which contains assault as an element unless the 'degree of violence to the person assaulted exceeded that to which consent was given'.<sup>128</sup>

The decision in *Lergesner v Carroll* reflects Justice Derrington's judgment in the older Queensland decision of *Raabe*.<sup>129</sup> In his judgment in *Raabe* Derrington J held:<sup>130</sup>

If the charge is one of which assault is an element, then the absence of consent to the assault must be proved. A charge of causing grievous bodily harm, for example, does not include such an element, and so is of a totally different construction from that of assault occasioning bodily harm. This distinction may have been deliberate but in any case it certainly exemplifies the point. As the statutory requirement of absence of consent is clearly an element of the present charge, no common law intrusion, particularly of latter-day origin, may qualify it.

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<sup>122</sup> *Criminal Law Consolidation Act 1935* (SA) s 22(1).

<sup>123</sup> *Criminal Law Consolidation Act 1935* (SA) s 22(3).

<sup>124</sup> *Criminal Code* (Qld) s 245(1); *Criminal Code* (WA) s 222(1).

<sup>125</sup> *Lergesner v Carroll* [1991] 1 Qd R 206.

<sup>126</sup> *Lergesner v Carroll* [1991] 1 Qd R 206, 212 (Shepherdson J), 217 (Cooper J).

<sup>127</sup> *R v Schloss* (1897) 8 QLJ 21, 22 (Griffith CJ)

<sup>128</sup> *Lergesner v Carroll* [1991] 1 Qd R 206, 212 (Shepherdson J)

<sup>129</sup> *Lergesner v Carroll* [1991] 1 Qd R 206; *R v Raabe* [1985] 1 Qd R 115.

<sup>130</sup> *R v Raabe* [1985] 1 Qd R 115, 125 (Derrington J).

Justice Connolly in *Raabe* took a different approach to the issue of consent to harm under the Queensland *Code*. Justice Connolly held that the common law with its public policy limitation on consent, discussed above, applied to the Queensland *Code*. He came to this conclusion on the basis of the ‘Assaults Unlawful’ provision in the *Code* that provides that the application of force by one person to the person of another may be unlawful although it is done with the consent of that other person.<sup>131</sup> Justice Connolly argued that the Assaults Unlawful provision imported the common law because it recognised, like the common law, that even when the prosecution could not prove the absence of consent, some consensual applications of force should still be unlawful. However, judgments favouring the plain reading *Lergesner v Carroll* approach have suggested that the Assaults Unlawful provision merely reinforces that consent does not make an offence without consent as an element (such as wounding or grievous bodily harm) lawful.

The application of the *obiter dictum* in *Lergesner v Carroll*, and Justice Derrington’s judgment in *Raabe*, on the effect of consent to the harm offences not involving assault as an element of the offence may result in several unusual consequences. The first is that it creates an illogical difference between charges, like wounding and assault occasioning bodily harm, which are so often equally applicable in particular circumstances.<sup>132</sup> This distinction may have the effect, through the use of charge selection, of making the availability of consent as a defence a matter of prosecutorial discretion.

In Queensland it seems that the consent of the person circumcised will provide a defence to the circumciser for a charge of assault, or any other harm offence with assault as an element. *Obiter dictum* suggests that consent is not a defence to a charge of wounding or grievous bodily harm in Queensland. However, an authoritative pronouncement on when, if ever, consent may be a defence to wounding or grievous bodily harm in Queensland is yet to be handed down. It is also not clear whether Western Australia will follow the *Lergesner v Carroll* approach, or that of the common law.

The Northern Territory’s *Criminal Code* defines assault as:<sup>133</sup>

the direct or indirect application of force to a person without his consent or with his consent if the consent is obtained by force or by means of menaces of any kind or by fear of harm or by means of false and fraudulent representations as to the nature of the act or by personation

An ordinary reading of the provision suggests that there is no assault when there is a lawful consent. The Northern Territory’s *Code* does not explicitly address whether consent is a defence to the other non-sexual harm offences. However, the Northern Territory’s *Code* does provide that an act is not unlawful if it is authorised, justified or excused.<sup>134</sup> Under s 26(1)(c) of the *Code* an act, omission or event is authorised if it is done, made or caused pursuant to authority, permission or licence lawfully granted.<sup>135</sup> An explicit limitation is placed upon all consents under the *Criminal Code* by s 26(3), namely:<sup>136</sup>

A person cannot authorize or permit another to kill him or, except in the case of medical treatment, to cause him serious harm.

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<sup>131</sup> *Criminal Code* (Qld) s 246(2); *Criminal Code* (WA) s 223.

<sup>132</sup> *Lergesner v Carroll* [1991] 1 Qd R 206, 218 (Cooper J).

<sup>133</sup> *Criminal Code* (NT) s 187(a).

<sup>134</sup> *Criminal Code* (NT) s 1 “Unlawful”.

<sup>135</sup> *Criminal Code* (NT) s 26(1)(c).

<sup>136</sup> *Criminal Code* (NT) s 26(3).

Consequently, an otherwise lawful consent is ineffective if it is given to an act of serious harm.<sup>137</sup> However, it is unlikely that a jury will find a circumcision amounts to serious harm in the Northern Territory (see discussion from page 45). There is nothing else explicit in the *Code* which limits when a person may permit another to harm them.

Northern Territory case law has not conclusively determined whether Queensland's *Lergesner v Carroll* approach, the common law, or another approach to consent to the non-fatal harm offences applies when harm less than serious harm is caused. There is nothing in the Northern Territory *Criminal Code* which explicitly suggests the common law approach ought to be followed. The ordinary language of the *Code* seems to suggest that a person's permission will provide a complete lawful justification for any non-fatal harm offence for any act not amounting to serious harm. It seems likely that consent will prevent a successful prosecution of a circumciser in the Northern Territory (so long as it is held that the particular procedure does not constitute serious harm).

Consent is a defence to assault in Tasmania. Only two judgments have addressed the question of when consent will not be a lawful justification for an assault in Tasmania. Those cases are *R v Holmes*,<sup>138</sup> decided in 1993 and *Emmett v Arnold*,<sup>139</sup> decided in 2006. These decisions suggest in *obiter dicta* that: 'there can be no valid consent to force which is intended or likely to cause bodily harm, and which does cause bodily harm.'<sup>140</sup> In *Holmes*, Justice Wright suggested that the relevant law in Tasmania coincides with common law.<sup>141</sup> He cited in particular *Attorney General's Reference (No 6 of 1980)*<sup>142</sup> which held that a person may not consent to the infliction of actual bodily harm for no good reason. In *Holmes*, Justice Wright added that the assault must also constitute a breach of the peace to lose the protection from criminal responsibility for assault that consent provides in Tasmania.<sup>143</sup> He came to that conclusion by relying on s 182(4) of the *Code* which provides:<sup>144</sup>

Except in cases in which it is specially provided that consent cannot be given, or shall not be a defence, an assault is not unlawful if committed with the consent of the person assaulted unless the act is otherwise unlawful, and the injury is of such a nature, or is done under such circumstances, as to be injurious to the public, as well as to the person assaulted, and to involve a breach of the peace.

On its plain reading, the subsection creates five separate requirements all of which must be satisfied to preclude reliance on consent as a defence to assault: that consent is not expressly excluded as a defence; that the assault is otherwise unlawful; as well as injurious to the public; and injurious to the person assaulted; and that the assault is also a breach of the peace. Such an interpretation would provide considerable, if not insurmountable, obstacles to a successful prosecution for assault in relation to a consensual circumcision in Tasmania. A circumcision will, even on Justice Wright's interpretation of the *Code* in *Holmes*, only be an unlawful assault in Tasmania where there is consent, if it were 'injurious to the public' (it inflicts actual bodily harm for no good reason) and a breach of the peace.

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<sup>137</sup> *R v Minor* (1992) 2 NTLR 183, 195-196 (Mildren J).

<sup>138</sup> *R v Holmes* [1993] TASSC 5 (Unreported, Wright J, 11 February 1993).

<sup>139</sup> *Emmett v Arnold* [2006] TASSC 5 (Unreported, Blow J, 16 February 2006).

<sup>140</sup> *R v Holmes* [1993] TASSC 5 (Unreported, Wright J, 11 February 1993) [7].

<sup>141</sup> *R v Holmes* [1993] TASSC 5 (Unreported, Wright J, 11 February 1993) [3]-[4].

<sup>142</sup> *Attorney-General's Reference* (No. 6 of 1980) [1981] QB 715, 719 (Lane CJ).

<sup>143</sup> *R v Holmes* [1993] TASSC 5 (Unreported, Wright J, 11 February 1993) [11]; *Criminal Code* (Tas) s 182(4).

<sup>144</sup> *Criminal Code* (Tas) s 182(4).

The Tasmanian *Criminal Code* does not expressly state whether consent of the person harmed affects the criminal liability of a person for wounding or grievous bodily harm. However, there is Tasmanian authority for the proposition that a wounding will not be unlawful if the victim consents so long as s 53 of the *Criminal Code* does not apply.<sup>145</sup> Section 53 provides:<sup>146</sup>

No person has a right to consent to the infliction –

(a) of death upon himself;

(b) except as provided in section 51 [the surgical operation exception], of an injury likely to cause death; or

(c) of a maim for any purpose injurious to the public –

and any consent given in contravention hereof shall have no effect as regards criminal responsibility.

A court may similarly hold that s 53 applies to grievous bodily harm. As discussed above, the injury caused by a circumcision is not ‘likely’ to cause death as is required to enliven s 53(b) (see discussion from page 41). Circumcision is also probably not a maim. ‘Maim’ has a long established technical meaning at law which focuses on the effect of the injury on the person’s ability to perform in a battle:<sup>147</sup>

A maim is bodily harm whereby a man is deprived of the use of any member of his body or of any sense which he can use in fighting, or by the loss of which he is generally and permanently weakened, but a bodily injury is not a maim merely because it is a disfigurement.

A man is not generally weakened or permanently less able to fight due to a circumcision. A circumcision would not be a maim should the technical definition of maim be accepted in Tasmania today.<sup>148</sup> Consequently, there seem to be considerable obstacles to proving an unlawful assault, wounding and grievous bodily harm in cases of consensual circumcision in Tasmania. However, it is unlikely that a circumcision will constitute grievous bodily harm in Tasmania (see discussion from page 40).

### 3.6 Parental Authorisation: Incapable Minors

South Australia has the only legislation in Australia which provides a general power for parents to make legal, by their consent or authorisation, what would otherwise be a criminal offence to their child. There is no general common law rule of the same nature. However, common law cases contain *obiter dicta* statements which suggest that a person who circumcises a child is not

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<sup>145</sup> *Criminal Code* (Tas) s 53; *McCallum* [1969] Tas SR 73, 82-3 (Burbury CJ).

<sup>146</sup> *Criminal Code* (Tas) s 53.

<sup>147</sup> James Stephen, *A Digest of the Criminal Law* (1883) art 227.

<sup>148</sup> However, courts have previously given some indication that they may be willing to move away from the technical test of maim, see for example: *Arthur v Arthur* [1964] ALR 1021, 1025 (Gibson J); *Vallance v The Queen* (1961) 108 CLR 56, 75-76 (Windeyer J). It is not clear if courts will be willing to make such a move when interpreting the Tasmanian *Criminal Code*.

criminally responsible for the act if the child's parents consented to, or authorised, the procedure.<sup>149</sup>

This section discusses the operation of the South Australian parental consent provision and suggests a possible basis for the lawfulness at common law of the circumcision of minors incapable of consenting. It concludes by discussing whether a possible common law exception operates in the criminal code states. The legislation in Australia relating to surgical operations, and the common law surgical operation exception, each of which may also make a circumcision of a child lawful, will be discussed in the following section.

## South Australia

Section 22 of the South Australian *Criminal Law Consolidation Act 1935* describes when consent is a defence to the harm offences in the Act.<sup>150</sup>

- (1) This Division does not apply to the conduct of a person who causes harm to another if the victim lawfully consented to the act causing the harm.
- (2) A lawful consent given on behalf of a person who is not of full age and capacity by a parent or guardian will be taken to be the consent of the person for whom the consent was given.
- (3) A person may consent to harm (including serious harm) if the nature of the harm and the purpose for which it is inflicted fall within limits that are generally accepted in the community.

This provision explicitly allows the consent of a parent to be given in the place of an incapable minor's consent. It also provides that a parent may only consent on behalf of their child if the nature and purpose of the harm fall within limits that are generally accepted in the community. The legislation pointedly provides as an example that:<sup>151</sup>

A person may (within the limits referred to above) consent to harm that has a religious purpose (eg male circumcision but not female genital mutilation).

Thus, it seems that only particularly reprehensible circumcisions will be capable of constituting harm or high threshold harm offences in South Australia when there is parental consent. Joint parental consent is not needed on an ordinary reading of the legislation. South Australia does not explicitly allow for parental consent to affect the lawfulness of an assault. However, the legislation does provide that:<sup>152</sup>

- (a) conduct that lies within limits of what would be generally accepted in the community as normal incidents of social interaction or community life cannot amount to an assault; and
- (b) conduct that is justified or excused by law cannot amount to an assault.

The first paragraph reflects the established common law rule that ordinary social physical interaction (such as supportive back patting, or brushing past someone on a crowded street) is not

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<sup>149</sup> *R v Brown* [1994] 1 AC 212, 231 (Lord Templeton); *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 297 (Deane J).

<sup>150</sup> *Criminal Law Consolidation Act 1935* (SA) s 22.

<sup>151</sup> *Criminal Law Consolidation Act 1935* (SA) s 22 "Examples" 1.

<sup>152</sup> *Criminal Law Consolidation Act 1935* (SA) s 20(2).

a criminal offence.<sup>153</sup> The second paragraph allows reference to all statutory and common law defences relevant to assault.<sup>154</sup> Whether there is a common law defence to circumcision (and the effect of parental authorisation on the criminal liability of a person who circumcises a minor, if any) is discussed in the following subsection.

### The Common Law

The common law in this area operates unaffected by legislation in Victoria, New South Wales, the Australian Capital Territory, and in relation to assault in South Australia. The criminal codes in the Northern Territory, Queensland, and Western Australia do not explicitly allow for reference to the relevant common law. The common law should not ordinarily be read into a criminal code. However, the ambiguity on the matter in the codes may allow for the common law to be imported in these jurisdictions. The text of the Tasmanian *Criminal Code* generally makes the consent of the person actually harmed a necessary, but not sufficient, condition for a lawful assault or wounding.<sup>155</sup> However, a common law defence saving provision exists in the Tasmanian *Criminal Code Act 1924*.<sup>156</sup> A Tasmanian court could rely upon this provision to import the common law in this area.

The lawfulness of circumcision under common law has never been directly at issue in Australia or England. Common law cases contain *obiter dicta* suggesting that a person who circumcises a child is not criminally responsible for the act if the child's parents authorised the procedure. This section begins by examining these non-binding judicial comments, and concludes by analysing the possible basis of a common law parental consent to harm defence.

The legality of parental authorisation of circumcision under common law has been mentioned in passing in several leading judgments on the lawful authorisation of harm. For example, Lord Templeton in the House of Lords decision of *R v Brown* notably suggested circumcision was lawful in the following passage of his judgment:<sup>157</sup>

Even when violence is intentionally inflicted and results in actual bodily harm, wounding or serious bodily harm the accused is entitled to be acquitted if the injury was a foreseeable incident of a lawful activity in which the person injured was participating. Surgery involves intentional violence resulting in actual or sometimes serious bodily harm but surgery is a lawful activity. Other activities carried on with consent by or on behalf of the injured person have been accepted as lawful notwithstanding that they involve actual bodily harm or may cause serious bodily harm. Ritual circumcision, tattooing, ear-piercing and violent sports including boxing are lawful activities.

More recently in England, in the context of a family law specific issues order dealing with a child's circumcision, Justice Wall suggested that:<sup>158</sup>

A case can be made for describing ritual male circumcision without any medical need for it as an assault on the bodily integrity of the child; indeed, that is the case which is made in much of the medical literature to which I was referred.... Whilst the medical benefits

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<sup>153</sup> This is confirmed by the second reading speech: South Australia, *Parliamentary Debates*, House of Assembly, 22 October 2003, 586 (Michael Atkinson, Attorney General).

<sup>154</sup> This was confirmed in the second reading speech: South Australia, *Parliamentary Debates*, House of Assembly, 22 October 2003, 586 (Michael Atkinson, Attorney General).

<sup>155</sup> Except in the circumstances of some surgical operations, see discussion from page 63.

<sup>156</sup> *Criminal Code Act 1924* (Tas) s 8.

<sup>157</sup> *R v Brown* [1994] 1 AC 212, 231 (Lord Templeton).

<sup>158</sup> *Re J (Specific Issue Orders: Muslim Upbringing & Circumcision)* [1999] 2 FLR 678, 688 (Wall J).



of ritual male circumcision are now controversial, the fact remains that not only is it insisted upon by Muslims and Jews, but that male circumcision itself has, over the years, become an accepted practice amongst a significant number of parents in England.

In my judgment, therefore, where two parents, jointly exercising parental responsibility for a male child cause him to be ritually circumcised in accordance with the tenets of their religion, that exercise of parental responsibility is lawful.

Justice Deane, in the High Court decision of *Re Marion*, dealing with the sterilisation of an intellectually disabled child, noted that:<sup>159</sup>

Even in the area of surgery for other than conventional medical purposes, there are circumstances in which it plainly lies within the authority of the parents of an incapable child to authorize surgery on the basis of medical advice. Plastic surgery to correct serious disfigurement for purely cosmetic purposes is not "therapeutic" within the accepted meaning of that word [reference excluded] and constitutes an obvious example. Male circumcision for perceived hygienic - or even religious - reasons is another.

There are more passing references to the legality of male circumcision in other Australian judgments.<sup>160</sup> The *dicta* cited above suggest that a child incapable of providing consent may be lawfully circumcised at common law, at least when there is joint parental consent, and the procedure remains an accepted practice amongst a significant number of parents. However, the conceptual basis of this possible common law circumcision exception is uncertain.

Case law generally cites neonatal circumcision as one of many anomalous exceptions, like emergency medical treatment, to the general rule that both the consent of the person harmed and a good reason for the act that causes the harm, are required to excuse a person for causing bodily harm to another.<sup>161</sup> Three possible justifications for the exception, each of which provides a different limit on the harm to a child a parent can authorise, can be inferred from an examination of the case law:

- 1) The Parental Consent Approach.
- 2) The Best Interests Approach
- 3) The Social Acceptability Approach

The Parental Consent Approach largely mirrors the operation of the South Australian legislation as to when parental consent is a justification for the harm and high threshold harm offences. Essentially, the Parental Consent Approach allows a parent's consent to make harm lawful where the common law would have allowed the child themselves to provide an effective consent were they capable of doing so. Thus, under the Parental Consent Approach, the effectiveness of parental consent is limited to circumcisions that society would consider acceptable. Case law seems to suggest that joint parental consent is sufficient if the circumstances of the particular

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<sup>159</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 297 (Deane J).

<sup>160</sup> See for example: *Re Inaya* [2007] FamCA 658 (Unreported, Cronin J, 27 June 2007) [60].

<sup>161</sup> Lord Mustill once suggested, when commenting upon the lack of a clear justification for the legality of professional boxing: 'It is in my judgment best to regard this as another special situation which for the time being stands outside the ordinary law of violence because society chooses to tolerate it.' See: *R v Brown* [1994] 1 AC 212, 265.

circumcision are acceptable to general society.<sup>162</sup> It is not clear whether single parental consent will be sufficient under the approach, at least when leave of the court has not been granted.

The Best Interests Approach originates within family and human rights law. The approach suggests that the law affords parents the authority to make decisions affecting their child, and authorises actions on behalf of their children, whenever doing so is in the best interests of the child. The approach has two requirements; explained in a family law context by the majority in *Re Marion*:<sup>163</sup>

[f]irst, the subjective consent of a parent, in the sense of a parent speaking for the child, is, ordinarily, indispensable. That authority emanates from a caring relationship. Secondly, the overriding criterion to be applied in the exercise of parental authority on behalf of a child is the welfare of the child objectively assessed. That these two principles become, for all practical purposes, one is a recognition that ordinarily a parent of a child who is not capable of giving informed consent is in the best position to act in the best interests of the child. Implicit in parental consent is understood to be the determination of what is best for the welfare of the child.

This approach, clearly delineated and applicable to human rights and family law, is discussed in more detail in chapters four and six.

The Social Acceptability Approach suggests that the common law rule on when harm is lawfully justified is not usually accurately stated in the case law. The Social Acceptability Approach suggests that society's acceptance of – the good reason for – the particular infliction of harm is in actuality the *sole* determinant of whether harm is justified at common law, and the commonly accepted exposition of the common law principle is incorrect. The approach holds that the degree of harm and the presence of the consent of the circumcised person, or the circumcised person's parents' authorisation, are just important factors that may influence whether the circumstances of a circumcision are considered acceptable by society. This approach can be implicitly seen in the following passage of Lord Mustill's decision in the controversial case of *R v Brown* in which he notes in his concluding discussion on the legality of rough horseplay:<sup>164</sup>

Once again it appears to me that as a matter of policy the courts have decided that the criminal law does not concern itself with these activities, provided that they do not go too far. It also seems plain that as the general social appreciation of what is tolerable and of the proper role of the state in regulating the lives of individuals changes with the passage of time, so we shall expect to find that the assumptions of the criminal justice system about what types of conduct are properly excluded from its scope, and about what is meant by going 'too far', will not remain constant.

Lord Mustill's analysis was approved in the English Court of Appeal case of *R v Konzani*.<sup>165</sup> Under the Social Acceptability approach the acceptability, and thus lawfulness, of a circumcision, like any other act that inflicts harm, is determined on the facts of the particular case. Many factors, including the presence or absence of the consent of the person circumcised or their parents' authorisation, the method used, and the reason given for the procedure may influence whether the circumstances of a particular procedure are deemed within acceptable limits by society. No particular factor is strictly required under this approach.

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<sup>162</sup> See for example: *Re J (Child's Religious Upbringing and Circumcision)* [2000] 1 FCR 307; *Re S* [2005] 1 FLR 236.

<sup>163</sup> (1991) 175 CLR 218, 239-240 (Mason CJ, Dawson, Toohey and Gaudron JJ).

<sup>164</sup> [1994] 1 AC 212, 265 (Lord Mustill).

<sup>165</sup> *R v Konzani* [2005] EWCA Crim 706 (Unreported, Judge Fox, 17 March 2005) [36].

The preferable approach is not clear. *Obiter dicta*, admittedly neither authoritative nor detailed, suggest that a lawful circumcision will ordinarily have certain features. The first is the consent of at least one of the parents. However, the cases suggest that joint parental consent is preferred, and perhaps even necessary, when it is capable of being given, unless there is leave of a court. Secondly, the acceptance of the practice amongst a significant number of people in the community is important, if not essential, to its lawfulness.

The Best Interests Approach is neither appropriate nor likely to be accepted as the common law approach for determining when a circumciser is protected from criminal liability for performing a circumcision on a minor. The criminal law has not historically concerned itself with what is in the best interests of the person harmed when determining criminal responsibility. The criminal law is generally focused on the interests of the community. Les Haberfield recognises this focus as the reason why the law governing when consent may be provided as a defence differs between criminal and private law.<sup>166</sup> Not everything in the best interests of a particular person will be in the best interests of the community. Furthermore, the common law has previously shown, as suggested by the Australian Law Reform Commission, 'a measure of ethnocentricity' in accepting the validity of consent in some circumstances but not others.<sup>167</sup> British judgments have long held that the circumstances in which the consensual infliction of harm will be protected from criminal liability reflect the standards of English society. This point is illustrated by comparison of the condemnation of ritual scarification and homosexual sadomasochistic activities by the judiciary in England,<sup>168</sup> with their condoning of the largely comparable harms of ear piercing, branding of a married partner,<sup>169</sup> religious circumcision and corporal mortification.<sup>170</sup> The interests of the particular person harmed are not, in these circumstances, the sole or the primary determining factor of lawfulness.

The illegality of less invasive forms of female genital mutilation, such as a pinprick, or scratch of the genitals to draw blood, is particularly illustrative of this point. Such acts may confer a benefit on some women, such as an advantageous status in their cultural community, whilst resulting in almost no pain or longstanding alteration to the genitals. However, female genital mutilation, of any type, will almost certainly not be considered lawful under statute or common law because, it seems, female genital mutilation is generally considered reprehensible by Australian society, no matter how insignificant the harm or significant the potential benefit. This has been demonstrated recently by the retraction of a suggestion by the Royal Australian and New Zealand College of Obstetricians and Gynaecologists to allow doctors to perform a minor form of the ritual, to reduce the number of women having the procedure performed by traditional non-medical practitioners, after there was significant public uproar about the suggestion.<sup>171</sup>

Acceptance of the Best Interests Approach would also result in the undesirable consequence of a circumciser being left open to criminal liability for any circumcision they perform that is not in a child's best interest. This is of considerable concern because it is not always easy to discern which actions are in a child's best interests.

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<sup>166</sup> Les Haberfield, 'The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues' (1997) 23 *Monash University Law Review* 92, 105.

<sup>167</sup> Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 503.

<sup>168</sup> See: *R v Adesanya* (1974) *The Times* 16-17 July 1974; *R v Brown* [1994] 1 AC 212.

<sup>169</sup> *R v Wilson* (1996) 2 Cr App Rep 241.

<sup>170</sup> For a discussion of the various harmful activities considered by the courts see: The Law Commission, *Consent and Offences against the Person*, Consultation Paper No 134 (1994); The Law Commission, *Criminal Law: Consent in the Criminal Law*, Consultation Paper No 139 (1995).

<sup>171</sup> Padraic Murphy and Kate Sikora, 'Barbaric Surgery Plan for Baby Girls', *The Daily Telegraph* (New South Wales) 28 May 2010, 3.

Social acceptability has previously been recognised in Australia and overseas as being at the heart of the common law approach. Both English and Australian judgments have recognised that certain acts seem to stand ‘outside the ordinary law of violence because society chooses to tolerate [them].’<sup>172</sup> The significance of social acceptability to the lawfulness of harm, and the inappropriateness of the Best Interest Approach in the criminal law, suggests that either the Parental Consent or Acceptability Approach will be embraced by the courts.

It is suggested that the Social Acceptability Approach is the most consonant with the attitude of courts to the lawfulness of harm at common law. The legality of most of the ‘anomalous exceptions’ (such as infant circumcision, corporal punishment and brushing shoulders with a stranger on a crowded street) to the accepted common law rule can be explained by the Social Acceptability Approach. It also provides guidance, although not firm rules, on determining whether any particular circumcision is lawful. The relevant question is: would society accept the circumstances which brought about the particular harm as lawful? This question seems to have been the guiding force for all previous common law decisions on whether a particular harm was lawful.

However, there is likely to be little difference in outcome whether the Social Acceptability or the Parental Consent Approach is applied in practice. Under either method parental consent, and perhaps even joint parental consent when leave of the court has not been granted, will ordinarily be required.<sup>173</sup> Under either approach, society’s acceptance of the particular circumstances of the harm as lawful will be the determinative factor in the lawfulness of the harm.

### 3.7 Surgical and Medical Operations

The law recognises certain surgical procedures as lawful. This section discusses whether circumcision is exempt from criminal liability because of its nature as a surgical operation. Legislation protecting people who perform particular types of surgical operation from some, or all criminal liability exists in the Northern Territory, Queensland, South Australia, Tasmania and Western Australia. ‘Reasonable surgical interference’ has also been recognised as lawful at common law.<sup>174</sup>

The law protecting surgical operations from criminal liability is not uniform in Australia. Four main approaches operate. They are: a criminal code surgical operation provision; a non-code statutory exemption; an exemption implicit in the wording of a criminal code; and the common law. Not all procedures commonly regarded as ‘surgery’ are necessarily lawful.

#### A General Surgical Operation Exception in a Criminal Code

The criminal codes of Queensland, Tasmania and Western Australia prescribe when a surgical operation (or surgical treatment in Western Australia), otherwise constituting a criminal offence, is lawful. The relevant sections provide complete protection from criminal liability for a person who performs an act covered by a surgical operation exemption. There has not been significant judicial consideration of these provisions.

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<sup>172</sup> *R v Brown* [1994] 1 AC 212, 265 (Lord Mustill).

<sup>173</sup> For a discussion of the potential necessity of joint parental consent for the circumcision of an incapable minor under common law see: Robert Wheeler, ‘Consent for Non-Therapeutic Male Circumcision: An Exception to the Rule?’ (2007) 93 *Archives of Disease in Childhood* 825.

<sup>174</sup> See: *R v Richardson* [1998] 3 WLR 1292; *Attorney-General’s Reference* (No. 6 of 1980) [1981] QB 715, 718 (Lane CJ).

In Tasmania:<sup>175</sup>

(1) It is lawful for a person to perform in good faith and with reasonable care and skill a surgical operation upon another person, with his consent and for his benefit, if the performance of such operation is reasonable, having regard to all the circumstances.

(2) In the case of a child too young to exercise a reasonable discretion in such a matter, such consent as aforesaid may be given by his parent or by any person having the care of such child.

(3) In the case of a person in such a condition as to be incapable of giving such consent as aforesaid, such operation may be performed without such consent.

In Western Australia:<sup>176</sup>

A person is not criminally responsible for administering, in good faith and with reasonable care and skill, surgical or medical treatment (including palliative care) —

(a) to another person for that other person's benefit; or

(b) to an unborn child for the preservation of the mother's life,

if the administration of the treatment is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

In Queensland:<sup>177</sup>

A person is not criminally responsible for performing or providing, in good faith and with reasonable care and skill, a surgical operation on or medical treatment of—

(a) a person or an unborn child for the patient's benefit; or a person or an unborn child to preserve the mother's life; if performing the operation or providing the medical treatment is reasonable, having regard to the patient's state at the time and to all the circumstances of the case...

The three provisions have two possible interpretations. The first is a restrictive interpretation that limits the application of the protection afforded by the particular section to procedures that are intended to have a therapeutic benefit. Such an interpretation requires one, or both, of the words 'surgical' and/or 'benefit' used in the provisions to be construed as requiring a beneficial therapeutic purpose for the operation. Canada has a surgical operation provision similar to the Australian exceptions in its *Criminal Code*.<sup>178</sup>

The therapeutic interpretation also reflects the dictionary definitions of the terms 'surgical' and 'surgical operation'.<sup>179</sup> The use of the term 'surgical or medical treatment' in Western Australia

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<sup>175</sup> *Criminal Code* (Tas) s 51.

<sup>176</sup> *Criminal Code* (WA) s 259.

<sup>177</sup> *Criminal Code* (Qld) s 282(1).

<sup>178</sup> *Criminal Code* (Can) s 45. Academic commentary on the Canadian exception has previously accepted the Canadian provision as embodying a therapeutic component, see: Margaret Somerville, 'Medical Interventions and the Criminal Law: Lawful or Excusable Wounding?' (1980) 26 *McGill Law Journal* 82. However, this matter is yet to be definitively settled in the courts, see below n 180.

<sup>179</sup> See: Arthur Delbridge et al (eds), above n 51, 1343, 1891 'surgical' relating to or involving surgery, 'surgery' the art, practice, or work of treating diseases, injuries, or deformities by manual operation or instrumental appliances, 'operation surgery' a process or method of operating on the body of the patient, as with instruments, to remedy injury.

rather than ‘surgical operation’, which is used in Queensland and Tasmania, may see courts in Western Australia adopt a definition which limits the term surgery to operations designed to cure, remedy or alleviate an existing condition. Similarly, the use in Queensland and Western Australia of the term ‘patient’ for the person being operated upon rather than the usual legislative term of ‘person’ suggests that the provision may have been intended to apply to therapeutic procedures.

The second possible interpretation of the criminal code exemptions involves construing the terms ‘surgical’ and ‘benefit’ broadly so that the exception is not limited to therapeutic operations. This interpretation might accept the term ‘surgical’ as including all acts generally regarded by the public as surgery, including non-therapeutic circumcision, and would not limit the consideration of ‘benefit’ to therapeutic benefits.<sup>180</sup> The term ‘benefit’ need only be construed as encompassing more than a therapeutic benefit, but perhaps no more than a possible prophylactic health benefit, for the section to apply to male circumcision currently.

It is clear that the surgical operation provisions may apply to anyone who performs a surgical operation or treatment.<sup>181</sup> It does not apply only to qualified surgeons, medical practitioners or other qualified persons. Each provision, whichever of the two interpretations is favoured, requires the operation to be reasonable in all the circumstances.<sup>182</sup> No criteria for the assessment of ‘reasonableness’ are provided. The health of the patient, the methods used, the reasons for, and the context of the procedure, may all be relevant to the court’s consideration of reasonableness. Not all ‘surgical’ procedures, or circumcisions, will be reasonable.<sup>183</sup> The lack of a clear health indication for circumcision may be an important factor affecting the reasonableness of its performance.

The procedure must be for the benefit of the person undergoing the operation/treatment. The reason for the operation rather than the consequence of the operation is the focus of the determination of whether an operation is beneficial.<sup>184</sup> Benefit may have its ordinary meaning as something that is good for a person. However it may mean, as the context from the surrounding terminology may suggest, an expected therapeutic benefit, as discussed above.

The exceptions only apply to people who perform surgical operations with reasonable care and skill and in good faith. To maintain consistency across the meaning of reasonable care and skill in the criminal law, and to ensure that only reprehensible errors are criminally sanctioned, the criminal standard of reasonable care and skill (negligence) will most likely apply. So that it must be proved that:<sup>185</sup>

in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

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<sup>180</sup> Age, economic and social factors, amongst other considerations, have all been considered as relevant factors by Canadian courts under the ‘terms reasonable in all the circumstances’. Those decisions have not seen fit to limit the term benefit to ‘therapeutic benefit’. See for example: *Cataford v Moreau* (1978) CS 933.

<sup>181</sup> Robin O’Regan, ‘Surgery and Criminal Responsibility Under the Queensland Criminal Code’ (1990) 14 *Criminal Law Journal* 73.

<sup>182</sup> In Queensland and Western Australia the provision requires that reasonableness be judged ‘having regard to the patient’s state at the time’: *Criminal Code* (Qld) s 282(1); *Criminal Code* (WA) s 259.

<sup>183</sup> For example, a court would find a circumcision on a consenting adult by a qualified surgeon in a fully equipped hospital a more reasonable operation than a circumcision performed on a whim by a lay person upon an ill baby.

<sup>184</sup> Law Reform Commission of Canada, *Medical Treatment and Criminal Law*, Working Paper 26 (1980) 40; *Cataford v Moreau* (1978) CS 933.

<sup>185</sup> *R v Bateman* [1925] 19 Crim App 8, 11 (Hewart CJ).

Surgical operation/treatment not provided in good faith, that is intended to cause, or is reckless as to causing, excessive harm and pain, or that completely disregards known dangers, will breach the minimal standard of care required to receive protection from the surgical operation provisions.<sup>186</sup>

In Tasmania, consent must be provided for the procedure to be lawful if the person being operated on is capable of providing consent at the time.<sup>187</sup> Parents may consent to a surgical operation on behalf of their children if the child is too young to exercise a reasonable discretion on the matter in Tasmania.<sup>188</sup> No guidance is given as to how to interpret the term 'reasonable discretion'. The other requirements of the provision for adults and children old enough to exercise a reasonable discretion, other than the consent of the person operated upon, still need to be established in Tasmania when surgery is performed on a child. Patient or parental consent is not a necessary element in Queensland or Western Australia. However, courts will almost certainly consider the presence or absence of patient consent, and parental consent when appropriate, as relevant to the reasonableness of the procedure.

There will continue to be uncertainty about the surgical operation provisions until they are judicially interpreted. Commenting on the uncertain meaning of 'benefit' in Canada's surgical operation provision, Chief Justice Deschênes quoted the following from a journal article:<sup>189</sup>

This imprecision raises the question of determining whether the "benefit of the patient" arises from a medical judgment or a moral judgment. The Canadian courts have not yet had the occasion to deal with this question, the importance of which will no doubt arise in respect of esthetic [sic] surgery, transsexuality or in voluntary sterilization. The fact that these practices have for some time become customary doubtless explains the absence of the jurisprudence. It may therefore be thought that the courts would only intervene in cases of extreme gravity. The result is that criminal law holds a sword of Damocles suspended above the operating table.

The surgical exceptions in Tasmania, Queensland and Western Australia may only ever provide a defence to a parent or a circumciser charged after the performance of a circumcision if 'surgery' includes non-therapeutic circumcision and 'benefit' includes non-therapeutic (perhaps social, spiritual, prophylactic or other) benefits.

If a therapeutic purpose is not required by the section a circumcision must still be 'for the benefit' of the person/patient operated upon/treated, reasonable in the circumstances, and performed with reasonable care and skill in good faith to attract the protection the exception affords from criminal liability. In Tasmania the consent of the person operated upon, or the parent of the child operated upon, is required if it can be given at the time. In Queensland and Western Australia it is also likely that patient consent and/or parental authorisation (if the procedure is performed on a young minor) will also ordinarily be required as part of the requirement that the procedure be reasonable in all the circumstances.

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<sup>186</sup> See also: *Criminal Code* (Tas) s 149. That section makes it a duty of a person doing '...a lawful act of a dangerous character which requires special knowledge, skill, attention, or caution, to employ in so doing a reasonable amount of such knowledge, skill, attention, and caution.' Queensland and Western Australia also have utilisation of skill in the performance of a dangerous activity sections, see: *Criminal Code* (Qld) ss 288-289; *Criminal Code* (WA) ss 265-266.

<sup>187</sup> *Criminal Code* (Tas) s 51(1).

<sup>188</sup> *Criminal Code* (Tas) s 51(2).

<sup>189</sup> Jacques Fortin, André Jodouin and Adrian Popovici, 'La Sanction et la Réparation des Atteintes au Corps Humain en Droit Canadien' (1975) 6 *Revue de Droit de l'Université de Sherbrooke* 150, 180. See: *Cataford v Moreau* (1978) CS 933, 936 (Deschênes CJ).

There are no provisions in the criminal codes of Queensland, Western Australia and Tasmania that allow for reference to a common law surgical operation exception. The statutory surgical operation exception suggests that reference should not, and need not, be made to any common law surgical operation exception.<sup>190</sup> However, this matter has not been settled.

### **An Implicit Exemption in the Northern Territory Criminal Code**

The Northern Territory *Criminal Code* does not have a general surgical exception from criminal liability. However, there are some express exemptions for those performing medical treatments in some circumstances in the Northern Territory *Code*.

‘Medical treatment’ is defined non-exhaustively within the *Criminal Code* as a term which includes ‘all forms of surgery’.<sup>191</sup> The choice of words ‘all forms of surgery’ may evidence an intention by parliament to give surgery a broad interpretation. That interpretation may reflect its use of the term ‘surgery’ in modern parlance as a term referring to a range of procedures performed for both therapeutic and non-therapeutic reasons (such as breast enhancement surgery). However, as discussed above, the dictionary definitions of ‘medical treatment’ and ‘surgery’ limit the application of the phrases to acts done with a therapeutic purpose. It is not clear whether the term ‘medical treatment’ will be limited to therapeutic treatments or not.

There are two express references to ‘medical treatment’ in the Northern Territory *Criminal Code*. Section 187(c) provides an exemption from a charge involving assault for applications of force done:<sup>192</sup>

when rescuing or resuscitating a person or when giving any medical treatment or first aid reasonably needed by the person to whom it is given or when restraining a person who needs to be restrained for his own protection or benefit or when attempting to do any such act;

Thus, medical treatment ‘reasonably needed by the person to whom it is given’ does not constitute an assault in the Northern Territory.<sup>193</sup> No guidance on when medical treatment is to be regarded as ‘reasonably needed’ is given. Section 187(c) seems largely, if not exclusively, directed to acts intended to benefit the health of a person who is incapacitated or otherwise unable to consent (because the absence of consent is an element of assault). Section 187(c) may well be construed by the courts as protecting people who provide medical treatment to people who reasonably need treatment for their health (rather than it being merely convenient or just possibly beneficial) but are unable to consent at the time. Non-therapeutic circumcisions that are not necessary for good health are unlikely to be considered as reasonably needed medical treatment under the construction suggested.

The protection for people who provide first aid is also qualified by the term reasonably needed. ‘Reasonably needed’ will probably not be read down by the courts to mean reasonably wanted. The choice of the term ‘reasonably needed’ seems to imply an objective test and excludes the possibility of subjective desire being sufficient to establish reasonable need. It seems artificial to construe the section as protecting ‘medical treatment’ or ‘first aid’ which is ‘reasonably needed’ for religious, economic or other non-health reasons. It seems quite likely that the courts will limit the protection afforded by the medical treatment exemptions to therapeutic treatments (primarily,

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<sup>190</sup> *Criminal Code* (Tas) s 51.

<sup>191</sup> *Criminal Code* (NT) s 1 “Medical Treatment”.

<sup>192</sup> *Criminal Code* (NT) s 187(c).

<sup>193</sup> *Criminal Code* (NT) s 187(c).



if not exclusively, in the context of people who are unable to consent to such procedures at the time of their performance).

The second reference to medical treatment in the Northern Territory *Criminal Code* is in section 26(3).<sup>194</sup> That provision explicitly recognises the right of a person to consent to serious harm being caused by medical treatment. That section provides, in the context of legal authorisations, that:<sup>195</sup>

A person cannot authorize or permit another to kill him or, except in the case of medical treatment, to cause him serious harm.

The interplay between permission, section 26(3), and the requirement that offences be unlawful has been discussed above (see discussion from page 54). The section seems to provide protection from criminal liability to any person who performs medical treatment on another with that other person's permission.

Except for a charge involving assault as an element of the offence, the *Code* does not prescribe when, or even whether, a person may lawfully provide medical treatment to a person who has not given their permission for the treatment. It is quite possible that, because of the lacuna in the law, the *Code* will be interpreted as extending the protection afforded to reasonably needed medical treatment for charges of assault to other offences in the *Code*. It is uncertain whether, and perhaps unlikely that, non-therapeutic procedures like circumcision will be regarded as medical treatment, and thus afforded the medical treatment protection under the *Code*. It does seem that medical treatment may be performed lawfully if it is done with the consent or permission of the person it is to be performed upon. Medical treatment is not an assault, even if permission for it has not been granted if, under the *Code*, it was 'reasonably needed' at the time by the person it was performed upon. However, it is not clear whether a non-therapeutic circumcision can be regarded as reasonably needed medical treatment.

### **Statutory Surgical Operation Exemption in South Australia**

South Australia passed the *Consent to Medical Treatment and Palliative Care Act 1995* which deals with patient and parental consent to medical treatment. Section 16 of the *Act* protects medical practitioners, and people participating in the treatment or care of a patient under the medical practitioner's supervision, from criminal liability for any acts done or made:<sup>196</sup>

- (a) with the consent of the patient or the patient's representative or without consent but in accordance with an authority conferred by this *Act* or any other Act; and
- (b) in good faith and without negligence; and
- (c) in accordance with proper professional standards of medical practice; and
- (d) in order to preserve or improve the quality of life.

The *Act* allows a person of, or over the age of 16 to consent to their own medical treatment.<sup>197</sup> A medical practitioner may administer medical treatment to a child if the parent or guardian

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<sup>194</sup> *Criminal Code* (NT) s 26(3).

<sup>195</sup> *Criminal Code* (NT) s 26(3).

<sup>196</sup> *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 16.

<sup>197</sup> *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 6.

consents to the treatment.<sup>198</sup> A medical practitioner may also administer medical treatment to a child (a person under the age of 16) if the child consents and:<sup>199</sup>

(i) the medical practitioner who is to administer the treatment is of the opinion that the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interest of the child's health and well-being; and

(ii) that opinion is supported by the written opinion of at least one other medical practitioner who personally examines the child before the treatment is commenced.

The South Australian legislation primarily protects medical practitioners. 'Medical practitioner', under the *Act*: 'means a person registered under the *Health Practitioner Regulation National Law Act 2010* (SA) to practise in the medical profession (other than as a student) and includes a dentist'.<sup>200</sup> The *Act* does not generally provide protection to traditional circumcisers or laypersons who provide medical treatment. Medical treatment is defined by the *Act* as meaning:<sup>201</sup>

treatment or procedures administered or carried out by a medical practitioner in the course of medical or surgical practice or by a dentist in the course of dental practice and includes the prescription or supply of drugs.

Neither 'medical' nor 'surgical' practice is defined within the *Act*. Similar definitional issues, which apply here, have already been discussed above in regard to the term 'medical', 'surgical' and 'medical treatment' (see discussion from page 62). Whether non-therapeutic circumcision is medical or surgical treatment is uncertain.

Section 5 of the *Act* further limits the application of the *Act*.<sup>202</sup> It may also provide some guidance as to the meaning of medical treatment in the *Act*. The section reads:<sup>203</sup>

This *Act* does not apply to medical procedures conducted for the purposes of research rather than for the purpose of treating, or determining the appropriate treatment for, the patient subjected to those procedures.

The section excludes procedures performed for research purposes from the application of the *Act*. The section implicitly suggests that determining the appropriate treatment and providing treatment are examples of medical treatment. Section 5 does not make reference to preventative or prophylactic acts. This may suggest that medical treatment is something which is provided when it is indicated by a patient specific condition.

Section 16 only protects medical practitioners for procedures performed 'in order to preserve or improve the quality of life'.<sup>204</sup> The terminology of preserving and improving the quality of life reflects the *Act*'s focus on palliative care. What may constitute an improvement to quality of life outside of the context of palliative care, and consensual therapeutic treatment, is not immediately clear. The term may be broad enough to include reference to non-health considerations, as the quality of one's life may potentially be improved by non-therapeutic surgeries.

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<sup>198</sup> *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 12.

<sup>199</sup> *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 12(b).

<sup>200</sup> *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 4 "Medical Practitioner"; *Health Practitioner Regulation National Law Act 2010* (SA).

<sup>201</sup> *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 4 "Medical Treatment".

<sup>202</sup> *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 5.

<sup>203</sup> *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 5.

<sup>204</sup> *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 16.

A child may consent to their own treatment if the procedure is in: ‘the best interest of the child’s health and well-being’.<sup>205</sup> It is difficult to predict whether a court will determine a non-medically necessary circumcision to be in the best interests of the child’s health and well being. In particular it is not clear whether circumcision’s possible prophylactic and preventive health benefits are sufficient to establish that the procedure is in the best interests of the child’s health. The relative safety of the procedure and its possible benefits will be weighed against the inherent risks of the procedure, the loss of the foreskin’s beneficial functions, and the ability of the child to decide the matter themselves later in life.

The provision only protects medical practitioners from criminal liability when they perform the procedure ‘without negligence’.<sup>206</sup> Because the section protects medical practitioners from both civil and criminal liability it is unlikely that the criminal standard of negligence is applicable. The result of that interpretation is that medical practitioners are not protected from criminal liability whenever they fail to meet the civil law standard of negligence.<sup>207</sup> The ordinary common law will probably continue to apply when protection is not afforded by the *Act*. There is nothing in the *Act* to suggest that it was intended to codify the law, or exclude existing common law defences.

## The Common Law

The common law recognises surgery can be provided in circumstances where consent is unable to be given at the time, if the treatment is necessary to save the patient’s life, or, perhaps, necessary to prevent serious injury to health.<sup>208</sup> Such operations must be medically necessary and not merely convenient.<sup>209</sup> Non-therapeutic circumcision is not medically necessary surgery. The common law also seems to recognise that a parent can authorise therapeutic surgery to be performed on their child.<sup>210</sup>

*Obiter dicta* suggest that reasonable surgical interference is lawful at common law. Many non-therapeutic procedures, including sterilisation, sex-change operations and a whole range of cosmetic surgeries, have been the subject of legal actions without their lawfulness being questioned. There are very few common law decisions on when a person, or a parent, may consent to a non-therapeutic surgical procedure under common law. The leading case, although not directly decided on the basis of the legality of a non-therapeutic procedure, is the English decision of *Bravery v Bravery*.<sup>211</sup> That case involved the consensual non-therapeutic sterilisation of a man.<sup>212</sup> The lawfulness of the procedure was not challenged by the majority. However, Lord Denning held in his dissenting judgment that the common law did not allow a man to consent to his own non-therapeutic sterilisation. Lord Denning came to that conclusion by applying the ordinary common law on when harm may be lawfully consented to (see discussion from page 51). In doing so he commented that:<sup>213</sup>

An ordinary surgical operation, which is done for the sake of a man’s health, with his consent, is, of course, perfectly lawful because there is just cause for it. But when there is

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<sup>205</sup> *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 12(b)(1).

<sup>206</sup> *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 16(b).

<sup>207</sup> The application of negligence law to circumcision is discussed in chapter 5.

<sup>208</sup> See: *Marshall v Curry* [1933] 3 DLR 261.

<sup>209</sup> *Murray v McMurchy* [1949] 2 DLR 442.

<sup>210</sup> However, it is important to reiterate that a parent’s authorisation may be challenged in court. See: *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

<sup>211</sup> *Bravery v Bravery* [1954] 3 All ER 59.

<sup>212</sup> *Bravery v Bravery* [1954] 3 All ER 59.

<sup>213</sup> *Bravery v Bravery* [1954] 3 All ER 59, 67 (Lord Denning).

no just cause or excuse for an operation, it is unlawful, even though the man consents to it. The classic instance is a case reported by Lord Coke, tried at Leicester in 1604, when a "young strong and lustie rogue, to make him impotent," got his companion to cut off his left hand so that he might avoid work and be able the better to beg. Both were found guilty on indictment of a criminal offence.

Lord Denning held that the procedure was unlawful because the man wished to have it for an unlawful purpose, namely, to divest himself of the responsibilities associated with sexual intercourse. Master of the Rolls Lord Evershed and Lord Justice Hodson distanced themselves from Lord Denning's judgment and suggested contrary to Lord Denning that the performance of the procedure in these circumstances was not 'injurious to the public interest'.<sup>214</sup>

Lord Denning's application of the law to the facts of a non-therapeutic consensual sterilisation would certainly not prevail today.<sup>215</sup> However, Lord Denning's statement of legal principle probably remains correct. The issue, with any procedure of a surgical, or surgery like, nature, is whether the procedure is reasonable in the circumstances. That question involves the consideration of public policy and notions of public interest. Once again, social acceptability is the likely determining factor for what is reasonable surgical interference. It is up to the finder of fact to determine whether the particular circumcision would be accepted by society as lawful on the facts.

### 3.8 Criminal Liability of Accessories

The terms used for accessorial liability in Australia are not uniform. References to the particular terms used in each jurisdiction are made below. Generally, if a person is criminally liable for the performance of a circumcision, a parent, or any other person, who does any act, or makes any omission, for the purpose of enabling or aiding that person to perform the circumcision,<sup>216</sup> abets (encourages) a person in the performance of that circumcision,<sup>217</sup> or counsels or procures the performance of that circumcision,<sup>218</sup> may potentially be charged. Ordinarily, those who assist in the performance of an illegal circumcision, who ask another to perform an illegal circumcision, or who are present and encourage (abet) the performance of an illegal circumcision, at least when they intend to provide that assistance, instigation or encouragement, will be criminally liable.

A person who provides assistance to a person after they have performed an illegal circumcision may themselves be liable in some circumstances for the offence of being an accessory after the fact. A person will be liable as an accessory after the fact if they know the offence was committed and they assist the person who committed it to evade justice. The precise knowledge or belief the person must have when they provide their assistance differs between jurisdictions.<sup>219</sup> There are

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<sup>214</sup> *Bravery v Bravery* [1954] 3 All ER 59, 63-64 (Evershed MR and Hodson LJ).

<sup>215</sup> *R v Dica* [2004] 3 All ER 593 [41] (Judge LJ).

<sup>216</sup> *Criminal Code* (ACT) s 45(1); *Criminal Code* (NT) ss 12(1)(b)-(c), 43BG(1); *Criminal Code* (Qld) s 7(1)(b); *Criminal Law Consolidation Act 1935* (SA) s 267; *Criminal Code* (Tas) s 3(1)(b); *Crimes Act 1958* (Vic) ss 323, 324; *Criminal Code* (WA) ss 7(b)-(c).

<sup>217</sup> *Giorgianni v R* (1985) 59 ALJR 461. See: *Criminal Code* (ACT) s 45(1); *Criminal Code* (NT) ss 43BG(); *Criminal Code* (Qld) s 7(1)(b); *Criminal Law Consolidation Act 1935* (SA) s 267; *Criminal Code* (Tas) s 3(1)(c); *Crimes Act 1958* (Vic) ss 323, 324.

<sup>218</sup> *Criminal Code* (ACT) s 45(1); *Criminal Code* (NT) ss 12(1)(c), 43BG(1); *Criminal Code* (Qld) s 7(1)(d); *Criminal Law Consolidation Act 1935* (SA) s 267; *Criminal Code* (Tas) ss 1 "Instigates", 3(1)(d); *Crimes Act 1958* (Vic) ss 323, 324; *Criminal Code* (WA) ss 7(d).

<sup>219</sup> *Criminal Code* (ACT) s 717; *Criminal Code* (NT) ss 13(1); *Criminal Code* (Qld) s 10; *Criminal Law Consolidation Act 1935* (SA) s 241(2); *Criminal Code* (Tas) s 6(1); *Crimes Act 1958* (Vic) s 325(1); *Criminal Code* (WA) s 10(1).

limits in Tasmania, the Northern Territory, New South Wales and Victoria as to the offence to which a person may be an accessory after the fact.<sup>220</sup> The assistance must help the principal offender escape apprehension, conviction, prosecution or punishment.<sup>221</sup>

A person under the age of ten cannot be an accessory to a crime. This is because the age of criminal responsibility is set at ten in each Australian jurisdiction.<sup>222</sup> It is also law in each Australian jurisdiction, although the precise wording differs between provisions, that no act or omission done or made by a person between the ages of ten and fourteen is an offence unless it is proved that the child had sufficient capacity to know that the act or omission was one they ought not to do or make.<sup>223</sup>

### 3.9 Summation: Criminal Responsibility

A circumciser will not, except perhaps in the most reprehensible of circumstances, be criminally liable for performing a circumcision in Australia when an adult, or a child capable of giving it, provides their consent for the procedure. However, there is considerable uncertainty as to whether the consent of a parent for the circumcision of their child (except perhaps in South Australia) is sufficient to allow a circumciser to legally perform the procedure. It seems certain that a parent may not authorise a circumcision to be performed upon their child in particularly reprehensible circumstances. However, it seems that the law may allow parents to authorise a circumcision to be performed upon their children in circumstances generally considered to be acceptable by society. Thus, the lawfulness of consensual circumcision, and perhaps the circumcision of young children where there is parental authorisation, seems to depend upon society's acceptance and condoning of the circumstances of the particular procedure.

The following issues are summarised below: whether circumcision fulfils the elements of the offences discussed above; when consent is likely to be sufficient to justify a circumcision; when parental consent is likely to be sufficient to justify the circumcision of an incapable minor; and, whether the surgical operations exceptions operating in Australia exclude criminal liability for a circumciser for performing a circumcision.

#### The Elements of the Offences

The circumstances of a circumcision would fulfil the elements of an assault, wounding, and the various non-wounding harm offences across Australia (prior to the consideration of the effect of consent and unlawfulness).

The circumstances of a typical circumcision are less likely to be held to satisfy the requirements for the high threshold harm offences in Australia. It is possible, depending on whether circumcision is considered a disfigurement, that a circumcision may fulfil the definition of at least one of the serious consequence offence provisions in the Australian Capital Territory, New South Wales, the Northern Territory, Tasmania, Queensland and Western Australia. Similarly it is

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<sup>220</sup> *Criminal Code* (NT) s 282; *Criminal Code* (Tas) ss 1 "Crime", 6(1); *Crimes Act 1958* (Vic) s 347.

<sup>221</sup> *Criminal Code* (ACT) s 717; *Criminal Code* (NT) s 13(1); *Criminal Code* (Qld) s 10; *Criminal Law Consolidation Act 1935* (SA) s 241(1); *Criminal Code* (Tas) s 6(1); *Crimes Act 1958* (Vic) s 325(1); *Criminal Code* (WA) s 10(1).

<sup>222</sup> *Criminal Code* (ACT) s 25; *Crimes Act 1900* (NSW) s 5; *Criminal Code* (NT) s 38; *Criminal Code* (Qld) s 29(1); *Criminal Law Consolidation Act 1935* (SA) s 5; *Criminal Code* (Tas) s 18(1); *Crimes Act 1958* (Vic) s 127; *Criminal Code* (WA) s 29.

<sup>223</sup> *Criminal Code* (ACT) s 26; *Crimes Act 1900* (NSW) s 5; *Criminal Code* (NT) s 38(2); *Criminal Code* (Qld) s 29(2); *Criminal Law Consolidation Act 1935* (SA) s 5; *Criminal Code* (Tas) s 18(2); *Crimes Act 1958* (Vic) s 127; *Criminal Code* (WA) s 29.

possible, depending on whether circumcision is considered to involve the loss of a distinct part of the body, that a typical circumcision will fulfil the definition of grievous bodily harm in Queensland. It is almost certain that a circumcision, unless performed in a particularly reprehensible manner, will not fulfil the physical and fault elements of a serious consequence offence in South Australia or Victoria.

It cannot be said for certain whether circumcision will constitute a child ill-treatment or abuse offence in any jurisdiction in Australia if it is performed in safe conditions and with the child's interests in mind. Circumcision is harmful and can be performed in cruel circumstances. However, any ambiguities in the law, or unusual and unintended applications, are likely to be resolved in light of the object or purpose of the child ill-treatment and abuse provisions to prevent and punish acts considered to be cruel to children.<sup>224</sup> It is presently unlikely that a finder of fact will subject a parent, or a surgeon, at least when they act with goodwill, skill, and with a spirit of benevolence, to the condemnation of this aspect of the criminal law, as the law seems designed to protect children from people acting with a malicious, contemptuous, harshly indifferent, cruel or aggravated mental state.

### **The Effect of Consent**

The probable effect of consent on a circumciser's liability for the offences discussed above is summarised in the table below:

Jurisdiction	Does Consent Exclude Liability?
Australian Capital Territory, New South Wales, South Australia, Victoria	Yes, if the circumcision performed is acceptable to society.
Northern Territory	Uncertain, but likely, if the circumcision does not result in 'serious harm'.
Queensland	Yes, if the circumciser is charged with any offence with assault as an element.  Uncertain, but unlikely, if the circumciser is charged with wounding or grievous bodily harm (or presumably any other offence without consent as an element).
Western Australia	Uncertain. It is unclear whether the law in Western Australia accords with the common law or with Queensland's law.
Tasmania	Yes.

### **The Effect of Parental Authorisation**

South Australia is the only jurisdiction with a legislative provision which clarifies some of the circumstances in which a parent may consent to harm being caused to their child. When a parent

<sup>224</sup> *Tasmania v M* [2008] TASSC 21 (Unreported, Blow J, 20 May 2008) [11].

authorises the circumcision of their child and the circumstances of the particular circumcision fall within limits that are generally accepted in the community, the circumciser will not be liable for the harm or high threshold harm offences in South Australia for performing the circumcision.<sup>225</sup>

The common law is applicable in New South Wales, The Australian Capital Territory, Victoria and South Australia. Under the common law, although the matter has never been directly decided, it seems that circumcision on boys too young to consent to the procedure themselves may be performed when there is joint parental consent (it is not certain whether single parental consent is sufficient without leave of a court) and the circumstances of the particular procedure are considered within the acceptable limits of society. It is unclear whether the position in Tasmania is the same by reason of the common law defence savings provision in the Tasmanian *Criminal Code*.<sup>226</sup>

It is also not clear whether the common law applies in the criminal code jurisdictions of Queensland, Western Australia or the Northern Territory. These criminal codes do not contain parental consent provisions, or a common law defence savings provision, and do not explicitly allow reference to the common law on the matter.

### **The Effect of the Surgical Operation Exceptions**

It is not immediately clear in any Australian state or territory jurisdiction whether male circumcision is legal by virtue of it being a lawful surgical operation. The lack of clarity in the law in the Northern Territory, Queensland, South Australia, Tasmania, and Western Australia is a result of unsettled definitions of one or more of the terms: 'medical', 'patient', 'surgical', 'medical treatment', 'surgical treatment' and 'surgical operation'. It is possible, although not clear, that these terms import the requirement of a therapeutic purpose into the exceptions. The necessity of a therapeutic purpose would exclude the surgical operation provisions from applying to non-therapeutic circumcision.

The common law 'reasonable surgical operation' exception, like the ordinary common law rules regarding consent to harm, requires consideration of the public interest and public policy in relation to the harm and the circumstances in which it was inflicted.

## **3.10 Critical Analysis**

This section begins by critically analysing the form of the criminal law. The second half of the section critically analyses the relevant law having regard to the main conceptual influences informing a law reformer.

### **Problems with the Form of the Current Criminal Law**

The first problem is that the criminal law, and its application to circumcision, differs markedly between Australian legal jurisdictions. For example, it seems possible at present, at least potentially, to successfully prosecute a consensual and complication free circumcision for a serious harm offence in Queensland even if the procedure is performed in a safe manner. However, it seems that the same prosecutor, on the same set of facts transposed to Victoria, could not successfully prosecute a serious harm offence for a dangerous but complication free

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<sup>225</sup> *Criminal Law Consolidation Act 1935* (SA) s 22.

<sup>226</sup> *Criminal Code Act 1924* (Tas) s 8.

circumcision under Victorian law (see discussion from page 41). Conversely, it also seems that a prosecutor may be able to successfully prosecute a consensual subincision for an assault in Victoria, at least when it is performed in a dangerous or reprehensible manner, but, a consensual subincision could probably not be prosecuted for assault under Queensland law however dangerously or reprehensibly it is performed (see discussion from page 40).<sup>227</sup>

The law does not seem to afford the same protection to circumcisers, patients or parents across Australia. This is of obvious and immediate concern to circumcisers who operate in more than one jurisdiction. The potential difference between jurisdictions is liable to encourage mixed messages over the lawfulness of male genital modification within Australia. It also allows a circumciser, a patient or a parent, to evade the law in their home jurisdiction by having a circumcision performed in another Australian jurisdiction.

The current criminal law fails to clearly state how it affects circumcision. There is no legislation which targets circumcision operating in any Australian legal jurisdiction. Indeed, the term 'circumcision' only appears in legislation in one state, in a single criminal statute, and it only appears once in an example section.<sup>228</sup> It is not easily apparent to lawyers, let alone laypeople, how the criminal law applies to circumcision. This makes it difficult for circumcisers to discern how the law applies to their practice, and to regulate their actions according to the law.

The criminal law also fails to set any clear and immutable standards in regard to male genital modification. For example, the lawfulness of a genital modification under common law depends upon the finder of fact determining that there was a good reason for both the harm caused and the circumstances in which the harm was caused (see discussion from page 51). This is a useful formulation for a law of general application. However, it is not an ideal way of regulating circumcision in particular. The current law does not provide, and is incapable of providing, certain and identifiable standards for circumcisers and other genital modifiers. Circumcision is a type of harm which ought to have certain minimum standards set in law. Allowing the fact finder in a court to have considerable discretion over such standards is unnecessary and undesirable.

## Conceptual Analysis

The conceptual influences of religion, ethnicity, health, autonomy, and naturalism are considered below.

Religious circumcision is lawful under the current criminal law when it is performed in relatively safe conditions with patient consent. However, the criminal law in Australia, except perhaps in South Australia, does not clearly provide for the legality of religious circumcision performed on incapable minors. It also fails to provide special protection for the particular methods some religious circumcisers are required to use according to their faith. The legal protection of religious circumcision, to the extent it exists, is also provided in a less than ideal manner. The two potential avenues of legality for religious circumcision at common law, the social acceptability exception and the surgical operation exception, are not framed to require the consideration of matters of religious significance. Indeed, the statutory surgical operation exceptions are primarily intended to protect therapeutic operations, and may only protect religious genital modifications if the exceptions are given a broad and perhaps not wholly intended interpretation and application. The social acceptability exception at common law, although capable of protecting religious practices widely accepted in mainstream society, is also not an ideal way of protecting a practice performed

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<sup>227</sup> For a description of a subincision see discussion from page 25.

<sup>228</sup> *Criminal Law Consolidation Act 1935* (SA) s 22 "Examples 1".



for religious reasons, because the exception does not strictly require the consideration of matters of religious significance, and does not, in particular, guarantee protection to any practice not accepted in mainstream society.

The law also fails to ensure the protection of ethnicity motivated circumcision in the same way that it fails to ensure the protection of religiously motivated circumcision. Ethnicity motivated circumcisions are not, as a minority and non-medical practice, guaranteed legal protection under either the surgical operation or social acceptability exceptions. Some ethnicity related genital modifications, by virtue of their invasiveness, like subincision, or by virtue of the unusualness or dangerousness of the method used to perform them, like some circumcisions performed in a traditional manner, are particularly unlikely to be lawful under the current legal regime.

The current law may also be failing proponents in the circumcision debate concerned with health. The law does not clarify whether circumcisions performed for prophylactic health benefits are legal. Members of Australia's medical community do not know for certain where they stand in law if they are asked to perform a circumcision for prophylactic reasons. The uncertainty as to whether the surgical operation exceptions apply to surgeries with potential prophylactic benefits is a particular concern. The current law also fails to set any clear health standards for circumcision. Furthermore, the criminal law may apply differently to different kinds of circumcisers. A finder of fact may, for example, when considering the reasonableness or acceptability of a circumcision, expect medical practitioners to meet significantly higher health and safety standards than a traditional circumciser, even when they are essentially performing the same procedure. This may be so even if ritual circumcisers could have been asked to have met, and perhaps ought to have been held to, higher standards in the particular circumstances.

Proponents in the circumcision debate advocating autonomy will have mixed opinions about the merit of the current criminal law. The law does seem to significantly protect and promote the autonomy of adult males, and male children old enough to consent, who wish to be circumcised. Indeed, it seems, at least in Queensland, Western Australia and the Northern Territory, that consent absolutely precludes the successful prosecution of a circumcision for an offence which requires proof of an assault. The presence of consent will ordinarily provide a defence to non-sexual harm offences in Australia performed in circumstances that society can accept (except perhaps in Queensland and Western Australia). However, the criminal law does provide some restrictions on the autonomy of adults. It does this by making acts performed in circumstances outside of the realms of the behaviour accepted by society unlawful. Proponents of autonomy may wish to make consent an absolute defence to charges which can be brought for the performance of a circumcision. They will, at the very least, wish to limit the circumstances in which a consensual circumcision may be illegal. They will also wish to clarify the circumstances in which a consensual circumcision is illegal, if such circumcisions are to be illegal, to ensure that people have a clear understanding of their options.

The current criminal law seems to offer little to the minimalist approach to protecting a minor's autonomy. It is clear that parents may currently circumcise their child for religious reasons in South Australia. Although uncertain it may also be that parents can have their child circumcised in any Australian jurisdiction so long as the circumcision is performed for a reason, and in circumstances, that society would have accepted at the time. The law also fails to strongly promote the future orientated consent approach to protecting a child's autonomy. The likelihood of the child coming to accept their circumcision in the future is but one of several concerns that a finder of fact may, but need not, consider when determining whether society would accept the particular circumcision. The criminal law does not even, as other areas of law do, direct the finder of fact to consider the child's best interests, or the likelihood of the child coming to accept the

procedure in the future, as a relevant consideration. However, some of the surgical operation exceptions do require the finder of fact to find that the particular procedure benefits the person it is performed upon, and is reasonable in the circumstances. This formulation may encourage some consideration of the consonance of the procedure with the child's potential world view in the future.

The criminal law also does little to promote naturalism. The law seems to allow adult men to undergo circumcision in most circumstances as long as they provide their consent for the procedure. The law, although uncertain, may also allow parents to circumcise their children so long as the procedure is performed in acceptable circumstances. The law, in this way, offers far less protection of naturalism to men than it does for women, whose freedom to have their genitals modified consensually, at least for non-therapeutic reasons, is severely limited by Australian law.<sup>229</sup>

### 3.11 Concluding Remarks

Circumcision is invasive, potentially harmful, and is at times performed in horrific and completely reprehensible circumstances. Some circumcisions, and particularly some of the more invasive genital modifications, deserve the sanction of the criminal law. Circumcision, for these reasons, will always be subject to the criminal law. However, it is unclear how or where the criminal law should draw the line between circumcisions that ought to be condoned and lawful, and circumcisions that ought to be condemned and sanctioned by the criminal law. The existing legal boundaries have not been the product of careful consideration. The same law which governs male circumcision also regulates fist fights in pubs, sadomasochistic sex, and rough 'horse play'. This may not be the most advantageous formulation of the law to govern the criminality or lawfulness of circumcision.

The next chapter begins the analysis of the application of Australia's private law to circumcision. It considers the requirements of an authorisation for a circumcision that is lawful under the criminal law. A person subject to an improperly authorised circumcision will have an action in tort for battery. The chapter focuses upon the requirements, including the circumstances in which leave of a court may be required, of a lawfully authorised circumcision of both capable and incapable minors.

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<sup>229</sup> *Crimes Act 1900* (ACT) s 74; *Crimes Act 1900* (NSW) s 45; *Criminal Code* (NT) s 186B; *Criminal Code* (QLD) s 323A; *Criminal Law Consolidation Act 1935* (SA) s 33A; *Criminal Code* (TAS) s 178A; *Crimes Act 1958* (Vic) s 32; *Criminal Code* (WA) s 306.

## Chapter 4

# Authorisation: Family Law

If circumcision does not contravene the criminal law, there is still a question as to when, how, and by whom the procedure may be authorised. A person who performs a circumcision without being properly authorised to do so may be liable for damages for battery.<sup>1</sup> There has been no detailed judicial consideration of the authorisation of circumcision in Australia. However, there have been *obiter dicta* comments made by Australian judges on the question of who may authorise a circumcision.<sup>2</sup> The lack of detailed justification for these comments, and the many and varied circumstances under which a circumcision may be performed, result in the law being unclear. A circumciser cannot be certain that they are protected from an action in battery until the requirements of a proper legal authorisation are settled. An adult will ordinarily be able to lawfully authorise the performance of a non-therapeutic procedure on themselves without court intervention so long as the procedure is not a criminal offence.<sup>3</sup> However, some non-therapeutic procedures on minors require the approval of a court before they may be legally performed under private law.<sup>4</sup> This chapter addresses when a minor, or their parents, may legally authorise a non-therapeutic circumcision that is lawful under Australia's criminal law. It also addresses when court approval is needed for the performance of a circumcision on an incapable minor to avoid an action in battery.

The chapter begins by focusing on three matters: first, the efficacy of the consent of the minor operated upon to relieve a circumciser from liability for battery for performing the circumcision; secondly, the efficacy of parental authorisation to relieve a circumciser from liability for battery for performing a circumcision on a minor; and, thirdly, the power to authorise non-therapeutic procedures vested in the Family Court of Australia (and the Family Court of Western Australia),<sup>5</sup> and the Supreme Courts in each Australian state and territory. The chapter then briefly addresses who may challenge the lawfulness of an authorisation for a circumcision to be performed upon a minor. The section that follows identifies some general problems with the form of the law and critically analyses the law with reference to the main conceptual influences acting upon a law reformer's decision making.

The analysis of the law in the initial sections suggest that adults, and children capable of fully understanding what is being proposed, can almost certainly provide consent to legally authorise a circumciser to perform the procedure on themselves. It also suggests that there is uncertainty as to whether the consent of a parent for the circumcision of their child is sufficient to legally authorise a circumciser to perform the procedure, or whether a court must approve the performance of a circumcision on a minor in some, or in all, circumstances. The critical analysis suggests that the current legal regime is a less than ideal way to regulate the lawful authorisation of circumcision under private law in Australia.

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<sup>1</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218; *Re Elizabeth Sui* [1989] FamCA 20, [29]-[30] (Ross-Jones J).

<sup>2</sup> See for example, *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 297 (Deane J).

<sup>3</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

<sup>4</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

<sup>5</sup> The Family Court of Western Australia is a state court vested with state and federal jurisdiction over family law matters. To avoid an overlap in discussion, the law in Western Australia, which is comparable with the federal family law discussed in the text, will be referenced in the footnotes.

## 4.1 The Consent of a Minor

The Australian High Court has stated that a minor (a person under 18 in every state and territory in Australia) is 'capable of giving informed consent when he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed'.<sup>6</sup> This is a correct statement of the common law, and it is unqualified by legislation in every Australian state and territory except for New South Wales and South Australia.<sup>7</sup> There is no detailed guidance on what should be considered in determining whether a minor has the capacity to provide a lawful consent under common law. Most cases on the competency of minors, particularly those in England, have involved decisions which were very serious, and which sometimes concerned decisions of life and death.<sup>8</sup> Consequently, the reasoning in these cases may not be completely applicable to a decision to circumcise.

However, it seems that several factors may be considered by a finder of fact determining whether a child has the capacity to fully understand the procedure proposed. Whether the child understands the nature of the procedure, and comprehends the physical consequences of their decision in broad terms, will certainly be a part of the determination.<sup>9</sup> The child's chronological, mental, and emotional age, are likely to be considered. So might the child's understanding of, and support for, the reason for the circumcision. Children are also sometimes required to understand more than adults would need to when providing consent to negate an action in battery.<sup>10</sup> The ability of the child to understand the wider ramifications of their decision, such as its effect on others, and any relevant moral or ethical issue involved in the decision, have also been considered by the courts when determining whether a child has the capacity to consent to the procedures they are to undergo.<sup>11</sup> The depth of understanding required by the courts typically depends upon how necessary the procedure is deemed to be for the child's health, and the gravity of the known and potential consequences of the child making a wrong decision.<sup>12</sup>

The common law operates concurrently with the *Minors (Property and Contracts) Act 1970* in New South Wales.<sup>13</sup> Section 49 of the *Act* expressly recognises that the consent of a child aged 14 or over to medical treatment has the same effect as the consent of an adult in regard to negating a

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<sup>6</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 237-238 (Mason CJ, Dawson, Toohey, Gaudron JJ); *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 188-189 (Lord Scarman).

<sup>7</sup> *Minors (Property and Contracts) Act 1970* (NSW) s 49; *Consent to Medical Treatment and Palliative Care Act 1995* (SA) ss 6, 12.

<sup>8</sup> *Re E* [1993] 1 FLR 386; *Re L (A Minor)* [1998] 2 FLR 810; *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 3 WLR 758; *Re R (A Minor: Wardship Consent to Treatment)* [1991] 3 WLR 592.

<sup>9</sup> An understanding in broad terms of the nature of the procedure is what is required of adults who authorise a procedure to negate an action in private law battery: *Rogers v Whitaker* (1992) 175 CLR 479, 490 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ); *Chatterton v Gerson* [1981] 1 All ER 257, 265 (Bristow J).

<sup>10</sup> Including, at least sometimes, the moral and emotional ramifications of their decision, see for instance: *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

<sup>11</sup> *Re Alex* [2004] Fam CA 297 (Unreported, Nicholson CJ, 13 April 2004), [68]; *Re E* [1993] 1 FLR 386, 394 (Ward J).

<sup>12</sup> See for example: *Re E* [1993] 1 FLR 386. This case involved an intelligent and mature 15 year old with strongly held religious beliefs concerning the refusal of blood treatments. The minor seemed to have the capacity to direct much of his own medical treatment. He refused blood treatments which would significantly increase his chances of surviving complications related to leukaemia which he was being treated for. The court held that the child was incapable of refusing the blood treatments because he was too immature to fully comprehend both the potentially harrowing consequences of his decision and the distress his death would cause to those around him.

<sup>13</sup> The *Minors (Property and Contracts) Act 1970* (NSW) s 49(3) states that s 49 of the *Act* does not affect 'such operation as a consent may have otherwise than as provided by this section.'

claim for battery.<sup>14</sup> The *Act* was passed 15 years prior to *Gillick v West Norfolk and Wisbech Area Health Authority*, the case which established the common law test in England, and twenty two years prior to *Marion's* case.<sup>15</sup> Consequently, the precise interplay between the common law and the *Act* is unclear.

The New South Wales *Act* expressly states that it does not affect the effect that consent may have independent of s 49 of the *Act*.<sup>16</sup> It seems, since the independent effect of consent is not affected by the *Act*, that a minor, whatever their age, who is competent under the common law, may provide as valid a consent as an adult in New South Wales. This interpretation of the law in New South Wales was accepted by the New South Wales Law Reform Commission.<sup>17</sup> The Commission suggests that: '...s 49 of the *Minors (Property and Contracts) Act 1970* now has a very limited operation, and that in most situations the determination of a young person's competence to consent to or refuse treatment is governed by the *Gillick* test at common law.'<sup>18</sup> They suggest this because: '[s]ince the decisions in *Gillick* and *Marion*, the common law is now prepared to recognise a young person's consent to treatment to an extent that surpasses the recognition provided for in s 49, and in this way s 49 is largely redundant.'<sup>19</sup> However, even if this interpretation is correct, it seems presently unclear whether, or perhaps when, a minor aged 14 years or older, but not competent under the common law, may consent to medical treatment in New South Wales.<sup>20</sup>

The protection offered by the New South Wales *Act* is also limited in nature. It only protects medical practitioners treating a person in the course of the practice of medicine or surgery and people acting under the guidance of a medical practitioner treating a person in the course of the practice of medicine or surgery.<sup>21</sup> It is not at all clear whether circumcision is a form of 'treatment' that is given in the course of medicine or surgery. Indeed, the ordinary meaning of the word treatment suggests that the section may only apply to circumcisions that are therapeutic (see discussion from page 62).<sup>22</sup>

In South Australia s 6 of the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) allows a person over 16 to make decisions about his or her own medical treatment as validly and effectively as an adult.<sup>23</sup> This *Act* was discussed in more detail in chapter three (see discussion

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<sup>14</sup> *Minors (Property and Contracts) Act 1970* (NSW) s 49.

<sup>15</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

<sup>16</sup> *Minors (Property and Contracts) Act 1970* (NSW) s 49(3).

<sup>17</sup> See: New South Wales Law Reform Commission, *Young People and Consent to Health Care*, Report No 119 (2008) [4.37]-[4.46].

<sup>18</sup> *Ibid* [4.37].

<sup>19</sup> *Ibid* [4.38].

<sup>20</sup> The *Act* removes age as a disabling factor for people aged 14 or over in New South Wales. However, s 49 of the *Act* will still only apply when the consent of the minor is legally valid. A consent will not be legally valid if it is given by a person without the capacity to give it. The *Act* does not define the capacity required of minors aged 14 and over. It seems likely that *Gillick* competence would be required by the courts. However, courts may judge the capacity of a minor aged 14 or over in NSW against the same criteria as they would an adult. The law on this matter must be considered unsettled. For further discussion see: *Ibid* [4.43].

<sup>21</sup> *Minors (Property and Contracts) Act 1970* (NSW) s 49(4).

<sup>22</sup> The Macquarie Dictionary in the context of medical treatment defines 'treat' as, 'to deal with (a disease, patient, etc.) in order to relieve or cure': Arthur Delbridge et al (eds), *The Macquarie Dictionary: Australia's National Dictionary* (2001) 1999.

<sup>23</sup> *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 6.

from page 67). A medical practitioner in South Australia is also protected from liability for battery under the *Act* if a minor under the age of 16 consents to the procedure and:<sup>24</sup>

(i) the medical practitioner who is to administer the treatment is of the opinion that the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interest of the child's health and well-being; and

(ii) that opinion is supported by the written opinion of at least one other medical practitioner who personally examines the child before the treatment is commenced.

This section, like the New South Wales *Act*, is limited to protecting medical practitioners and only applies to 'treatment'.

## 4.2 Parental Authorisation

Most circumcisions performed in Australia are performed upon minors too young to provide their own consent to the procedure.<sup>25</sup> The parental power to authorise non-therapeutic procedures is limited. A parent will only have the capacity to make a decision for their child when they are acting in the child's best interests.<sup>26</sup> A parent's view of what is in the child's best interests may be challenged in court. Who may make this challenge is discussed below.<sup>27</sup> If the matter is one of parental responsibility, which is discussed later, as an aspect of the care, welfare or development of the child, an *FLA* parenting order may be applied for.<sup>28</sup> The Supreme Courts of Australia have the power to make orders and give directions to protect the welfare of children through their *parens patriae* power.<sup>29</sup> The Family Court of Australia has a similar power granted to it by Part VII of the *Family Law Act 1975* (Cth) (*FLA*).<sup>30</sup> Under the *FLA* a party may not institute other proceedings if such proceedings can be initiated under Part VII of the *FLA*.<sup>31</sup> The welfare jurisdiction over children contained in the *FLA* is couched in broadly inclusive terms. Section 67ZC(1) reads: 'In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.'<sup>32</sup>

Nevertheless, the scope of the *FLA* is limited by the *Commonwealth Constitution*.<sup>33</sup> Judicial precedent suggests that the marriage power and the matrimonial causes power in the *Constitution* limit the application of the *FLA* welfare power to children of marriage only.<sup>34</sup> Precedent also suggests that the referral of powers over children to the Commonwealth by each state (except Western Australia) did not provide the Commonwealth with the power to legislate for the welfare

<sup>24</sup> *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 12(b).

<sup>25</sup> Claims for the circumcision of children less than six months of age constituted 18,756 out of 25,903 total circumcisions claimed on Medicare in 2007. Claims for the circumcision of children less than six months of age constituted 19,656 claims out of 26,826 total circumcisions claimed on Medicare in 2008. See, Medicare items 30653, 30656, 30659 and 30660 processed from January 2007 to December 2007, and January 2008 to December 2008. Medicare Australia, *Medicare Item Reports* (2010) <[https://www.medicareaustralia.gov.au/statistics/mbs\\_item.shtml](https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml)> at 20 October 2010.

<sup>26</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

<sup>27</sup> See discussion from page 89.

<sup>28</sup> *Family Law Act 1975* (Cth) pt VII; *Family Court Act 1997* (WA) pt 5.

<sup>29</sup> For a discussion of the basis of this power held by the state Supreme Courts see, Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees Under Chapter III of the Constitution' (2003) 31 *Federal Law Review* 57; *Coghlan v Law* [1982] 8 Fam LR 566, 569 (Everett J).

<sup>30</sup> *Family Law Act 1975* (Cth) s 67ZC; *Family Court Act 1997* (WA) s 162.

<sup>31</sup> *Family Law Act 1975* (Cth) s 69B; *Family Court Act 1997* (WA) s 184.

<sup>32</sup> *Family Law Act 1975* (Cth) s 67ZC(1); *Family Court Act 1997* (WA) s 162(1).

<sup>33</sup> *Commonwealth Constitution* ss 51(xxi)-(xxii).

<sup>34</sup> See: *AMS v AIF* (1999) 199 CLR 160, 243-244 (Callinan J).

of children who are not children of a marriage.<sup>35</sup> In 2007 over 86,000 children were born in Australia out of marriage.<sup>36</sup> In 2008 thirty-four percent of children born in Australia, some 101,917 children, were born out of marriage.<sup>37</sup> The result of the limitations set by the *Constitution*, and the decision by the states to not include the 'welfare' of children in the referral of power by the states to the Commonwealth is that the *parens patriae* jurisdiction of the state Supreme Courts will almost certainly still apply to a child who is not a child of marriage.<sup>38</sup> There are several recent examples of state Supreme Courts exercising their inherent *parens patriae* jurisdiction in cases that involve an ex-nuptial child.<sup>39</sup>

The issue of whether the *parens patriae* jurisdiction was left unaffected by the referral of powers to the Commonwealth is typically avoided by the state Supreme Courts. That is because, by virtue of the Commonwealth's *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth),<sup>40</sup> the state Supreme Courts now have all the jurisdiction of the Family Court of Australia, including its powers in relation to the welfare of children.<sup>41</sup> Although, the High Court has overturned the cross vesting legislation as it applies to Commonwealth courts, the vesting of Commonwealth power in state courts remains valid.<sup>42</sup> The result of the cross-vesting legislation is that each state Supreme Court may make orders in connection with the welfare of children (whether or not they are a child of a marriage).<sup>43</sup> This is so even though the precise basis of such an order in regard to ex-nuptial children, whether it be the *FLA* or the *parens patriae* power, is unclear.

The fundamental principle governing the exercise of the *FLA* welfare power, the *FLA* parenting orders, and the *parens patriae* power of the Supreme Courts is that the best interests of the child is to be the paramount consideration.<sup>44</sup> The *parens patriae* powers of the Supreme Courts, and the *FLA* welfare power, may be used as a check on the authorisation of the circumcision of minors, whether that authorisation is provided by the minor themselves, or the minor's parents. In determining what is in a child's best interests judicial decisions have shown a willingness to put the long term interests of a child above any short term loss or discomfort.<sup>45</sup> The courts have also been mindful to prevent harm to children where possible.<sup>46</sup> Consequently, if a procedure is proposed which will cause harm or result in loss, the benefit that justifies the harm will need to be likely to accrue and be more significant than the harm caused. Courts also consider the different treatments reasonably available and appropriate to achieve the purpose of the procedure proposed

<sup>35</sup> That is because the referring legislation does not make reference to the referral of the power to legislate on the 'welfare' of children, see: *AMS v AIF* (1999) 199 CLR 160, [256]-[265] (Callinan J).

<sup>36</sup> Australian Bureau of Statistics, *Table 1 Births, Nuptiality and Age of Mother* (2008) <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/1B23C8E60948A2B8CA2574EF0013F3C3/\\$File/33010do005\\_2007.xls](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/1B23C8E60948A2B8CA2574EF0013F3C3/$File/33010do005_2007.xls)> at 20 October 2010.

<sup>37</sup> Australian Bureau of Statistics, *3301.0 - Births, Australia, 2008* (2009) 24.

<sup>38</sup> *Department of Community Services v Y* [1999] NSWSC 644 (Unreported, Austin J, 30 June 1999), [91]-[97].

<sup>39</sup> See for example: *Queensland v B* [2008] 2 Qd R 562.

<sup>40</sup> *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth).

<sup>41</sup> See for example: *Director-General, Department of Community Services; Re Jules* [2008] NSWSC 1193 (Unreported, Brereton J, 2 September 2008).

<sup>42</sup> See: *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511.

<sup>43</sup> For an example of this reasoning see: *Director-General, Department of Community Services; Re Jules* [2008] NSWSC 1193 (Unreported, Brereton J, 2 September 2008).

<sup>44</sup> *Family Law Act 1975* (Cth) s 67ZC(2); *Family Court Act 1997* (WA) s 162(2).

<sup>45</sup> *Llyod v Lloyd* [1980] FLC 90816.

<sup>46</sup> *Re Baby A* [1999] NSWSC 787 (Unreported, Young J, 26 July 1999), [18]-[20]. Citing with approval: *Wellesley v Beaufort* (1827) 38 ER 236, 242 (Lord Eldon).

in order to ensure that the least invasive treatment is selected should some form of intervention be in the child's best interests.<sup>47</sup>

Under the *FLA*, the primary considerations as to what is in the child's best interests are that the child has a meaningful relationship with both of their parents, and that the child is protected from abuse and family violence.<sup>48</sup> The *FLA* also provides additional considerations, including, among other matters:<sup>49</sup>

- the views of the child;
- the relationship of the child to their family;
- the capacity of their family to provide for the needs (including emotional needs) of the child; and
- the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents.

The decision to circumcise a minor may have an important impact on their development. The minor's relationship with his parents, his family, and the community he is raised in, may all be affected by his circumcision status. Circumcision will also have an impact on a minor's physical development, and may impact on their psychological and even spiritual development. The *FLA* makes specific mention of the right of an Aboriginal and Torres Strait Islander child to enjoy his or her Aboriginal or Torres Strait Island culture.<sup>50</sup>

The British decision of *Re J* considered whether the performance of a circumcision was in the best interests of the minor in that case.<sup>51</sup> The child in question lived with his non-practising Christian mother and was to be raised in a largely secular community. His father, a Muslim, sought the circumcision of his son. The minor's father argued that the circumcision would see the minor 'firmly identified with his father, and confirmed in the eyes of Islam as a Muslim.'<sup>52</sup> Ultimately, the court decided not to authorise the circumcision. This was because the minor would not:<sup>53</sup>

grow up in an environment in which circumcision is a part of family life; or in which circumcision will be in conformity with the religion practised by his primary carer; or in which his peers have all been circumcised and for him not to be so would render him either unusual or an outsider.

Justice Wall characterised circumcision as an 'effectively irreversible surgical intervention which has no medical basis in J's case'.<sup>54</sup> The potential benefits of the circumcision were largely negated, in his Lordship's view, by the minor's secular upbringing.<sup>55</sup> Justice Wall also suggested that:<sup>56</sup>

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<sup>47</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

<sup>48</sup> *Family Law Act 1975* (Cth) s 60CC(2); *Family Court Act 1997* (WA) s 66C(2).

<sup>49</sup> *Family Law Act 1975* (Cth) s 60CC(3); *Family Court Act 1997* (WA) s 66C(3).

<sup>50</sup> *Family Law Act 1975* (Cth) s 60CC(3)(h); *Family Court Act 1997* (WA) s 66C(3)(h).

<sup>51</sup> First instance: *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)* [1999] 2 FCR 345. On appeal: *Re J (Child's Religious Upbringing and Circumcision)* [2000] 1 FCR 307.

<sup>52</sup> *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)* [1999] 2 FCR 345, 365 (Wall J).

<sup>53</sup> *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)* [1999] 2 FCR 345, 367 (Wall J).

<sup>54</sup> *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)* [1999] 2 FCR 345, 367 (Wall J).

<sup>55</sup> *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)* [1999] 2 FCR 345, 367 (Wall J).

<sup>56</sup> *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)* [1999] 2 FCR 345, 365 (Wall J).



The disadvantages are that despite the father's passionate defence of the procedure, J may be traumatised by it; he will, moreover, be living in the household of his mother, who disagrees with the procedure, and will find great difficulty in presenting it to J in a positive light.

The decision in *Re J* cannot be viewed as authority for the proposition that a religious circumcision will never be authorised by a court, or at least will never be authorised when the minor's primary care giver intends to raise them in a secular community. A court will ultimately weigh all the relevant factors in the particular circumstances to determine what is in each minor's best interests.<sup>57</sup>

The authorisation of an incapable minor's circumcision was also considered in the English case of *Re S*.<sup>58</sup> Justice Baron determined that circumcision was not in the minor's best interests in that case because the procedure was irreversible, the minor was ambivalent about his religion, he would be subject to the teachings of the different religions of his parents (Jainism and Islam), and the proposed circumcision could be postponed without any significant detriment until the minor was old enough to decide the matter himself.<sup>59</sup>

A court will consider several factors when determining whether a circumcision is in a child's best interests. Many of these factors are codified, in regard to medical procedures, in rule 4.09(2) of the *Family Law Rules 2004* (Cth).<sup>60</sup> These matters are:<sup>61</sup>

- (a) the exact nature and purpose of the proposed medical procedure;
- (b) the particular condition of the child for which the procedure is required;
- (c) the likely long-term physical, social and psychological effects on the child:
  - if the procedure is not carried out; and
  - if the procedure is carried out;
- (d) the nature and degree of any risk to the child from the procedure;
- (e) if alternative and less invasive treatment is available – the reason the procedure is recommended instead of the alternative treatments;
- (f) that the procedure is necessary for the welfare of the child;
- (g) if the child is capable of making an informed decision about the procedure – whether the child agrees to the procedure;
- (h) if the child is incapable of making an informed decision about the procedure – that the child:
  - is currently incapable of making an informed decision; and
  - is unlikely to develop sufficiently to be able to make an informed decision within the time in which the procedure should be carried out, or within the foreseeable future;

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<sup>57</sup> *Family Law Act 1975* (Cth) s 60CC(3)(m); *Family Court Act 1997* (WA) s 66C(m).

<sup>58</sup> *Re S* [2005] 1 FLR 236.

<sup>59</sup> *Re S* [2005] 1 FLR 236, [83] (Baron J).

<sup>60</sup> *Family Law Rules 2004* (Cth) r 4.09(2).

<sup>61</sup> *Family Law Rules 2004* (Cth) r 4.09(2).

- (i) whether the child's parents or carer agree to the procedure.

The *Family Law Rules*, like the decision in *Re S*, recognise the future capacity of the child to decide the matter himself, a lack of necessity to perform the procedure before the child has developed that capacity and the existence of parental agreement as important considerations in deciding whether or not to authorise a non-therapeutic procedure.

A court may, when determining whether a particular circumcision is in a particular child's best interests, consider: the extent of the procedure; the child's views; the circumstances in which the child is to be raised; the method used, including the pain relief available; the capacity to minimise and cope with complications; and the skill of the circumciser. If a court is to authorise action it will opt for the least invasive and least dangerous option available that fulfils the beneficial purpose of the procedure.<sup>62</sup> For example, a court might authorise the child to undergo an alternative, less invasive act, in lieu of a full circumcision, or other genital modification, if that would fulfil the same purpose as the proposed circumcision.

### 4.3 Is Court Authorisation Required for a Minor's Circumcision?

Parents must seek court authorisation for some special surgical procedures.<sup>63</sup> The High Court has held that a surgery is a special procedure if the procedure is non-therapeutic and there is a significant risk of the parent making a wrong decision as to what is in the best interests of the child.<sup>64</sup> In the leading Australian case of *Secretary of the Department of Health and Community Services v JWB and SMB (Marion's case)*, which dealt with the sterilisation of a mentally disabled female minor, the High Court found that the procedure's non-therapeutic purpose, its irreversible, major and invasive nature, and most importantly, the significant risk of making a wrong decision and the grave consequences if a wrong decision were made, required that court authorisation be sought for the procedure.<sup>65</sup>

The special medical procedures for minors that have already been identified as requiring court authorisation include: gender reassignment surgery;<sup>66</sup> gender reassignment treatment;<sup>67</sup> the termination of a pregnancy of a minor who is not competent under the common law;<sup>68</sup> and perhaps the removal of regenerative tissue for donation.<sup>69</sup> These procedures do not fall within the ordinary scope of the parental power to consent to medical treatment on behalf of their child. A judge of the Australian High Court, in *obiter dictum*, has previously recognised the power of parents to authorise a non-therapeutic circumcision.<sup>70</sup> Similar comments have been made by judges in the Family Court of Australia.<sup>71</sup> However, the issue has not yet received detailed

<sup>62</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

<sup>63</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

<sup>64</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

<sup>65</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 249 (Mason CJ, Deane, Toohey and Gaudron JJ).

<sup>66</sup> *Re A* (1993) 16 FamLR 715.

<sup>67</sup> *Re Alex* [2004] FamCA 297.

<sup>68</sup> *Queensland v B* [2008] 2 Qd R 562.

<sup>69</sup> *Re GWW and CMW* (1997) 21 FamLR 612. Contra: *Re Inaya (Special Medical Procedure)* [2007] FamCA 658 (Unreported, Cronin J, 27 June 2007).

<sup>70</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 295 (Deane J).

<sup>71</sup> See: *Re Inaya (Special Medical Procedure)* [2007] FamCA 658 (Unreported, Cronin J, 27 June 2007) [60]; *Re Jane* (1988) 85 ALR 409, 440 (Nicholson CJ).

judicial consideration. The following sections will discuss whether the circumcision of a minor is a special medical procedure having regard to the criteria delineated by the High Court in *Marion's* case.

### Non-therapeutic

The majority in *Marion's* case suggested that therapeutic surgery is surgery performed to treat a malfunction or disease.<sup>72</sup> The *Family Law Rules* suggest that the Family Court is concerned with procedures that are '...not for the purpose of treating a bodily malfunction or disease'.<sup>73</sup> Justice Brennan offered a similar, yet more thorough, definition of therapeutic treatment in his decision in *Marion's* case.<sup>74</sup>

I would define treatment (including surgery) as therapeutic when it is administered for the chief purpose of preventing, removing or ameliorating a cosmetic deformity, a pathological condition or a psychiatric disorder, provided the treatment is appropriate for and proportionate to the purpose for which it is administered. "Non-therapeutic" medical treatment is descriptive of treatment which is inappropriate or disproportionate having regard to the cosmetic deformity, pathological condition or psychiatric disorder for which the treatment is administered and of treatment which is administered chiefly for other purposes.<sup>75</sup> ...Therapeutic medical treatment is calculated to enhance or maintain as far as practicable the physical or mental attributes which the patient naturally possesses; it is not calculated to impair or destroy those attributes and the capacities they afford.

Justice Brennan's definition recognises that a procedure will only be therapeutic if it is appropriate and not disproportionate to fulfilling the purpose of the procedure. Circumcision performed for solely religious or aesthetic reasons is undoubtedly non-therapeutic. It is not immediately clear whether procedures with remotely possible prophylactic benefits, particularly benefits that are disputed as uncertain or which are of weak significance, are therapeutic under Brennan J's detailed definition, or under the definition in the majority judgment in *Marion's* case. However, the *Family Law Rules* suggest that any procedure which is performed for a reason other than 'treating' a 'bodily malfunction or disease' will be non-therapeutic. This approach was adopted in the Family Court when Chief Justice Nicholson in *Re Alex* suggested that 'therapeutic' would be limited to mean the treatment of:

disease in or malfunctioning of organs. In the context of sterilisation for example, they would seem to have had in mind a malignant cancer of the reproductive system which required an intervention that was medically indicated for directly referable health reasons.<sup>76</sup>

In *Marion's* case, the court refused to characterise sterilisation, with its possible psychological, menstrual hygiene and management benefits, as therapeutic. It seems that courts are reluctant to attribute a therapeutic purpose to a procedure unless there is clear evidence of the procedure being medically indicated, and performed primarily for the correction, curing or treatment of an

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<sup>72</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 250 (Mason CJ, Deane, Toohey and Gaudron JJ).

<sup>73</sup> *Family Law Rules 2004* (Cth) Dictionary "Medical procedure application".

<sup>74</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 274 (Brennan J).

<sup>75</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 269 (Brennan J).

<sup>76</sup> *Re Alex* [2004] Fam CA 297 (Unreported, Nicholson CJ, 13 April 2004) [195].

existing disease, deformity or malfunction. Consequently, a circumcision is likely to be classified as a non-therapeutic procedure under law.

### **Invasive, Irreversible and Major Surgery**

In *Marion's* case the High Court of Australia identified the invasive, irreversible and major nature of sterilisation as factors leading to its categorisation as a special procedure requiring court authorisation. Circumcision is invasive and irreversible.<sup>77</sup> However, the procedure may not necessarily be characterised as major. At least one Australian legal commentator has doubted whether the procedure could be characterised as major.<sup>78</sup> Les Haberfield, referring to circumcision, suggests that '...a procedure that takes only a few minutes, need not be performed in a hospital, and is still performed on many thousands of children in Australia each year could hardly be regarded as major surgery'.<sup>79</sup> Indeed, the procedure is certainly relatively minor and routine compared to female surgical sterilisation, and whilst serious complications of circumcision do exist, they are quite rare (see discussion from page 19). Furthermore, circumcision has long been accepted within Australia as a relatively minor procedure. The ethics of circumcision did not begin to be widely questioned in Australia until the procedure had already garnered acceptance in society. In contrast, procedures like sterilisation, gender reassignment, and tissue harvesting, have been regarded as controversial ever since they were first proposed.

The decisions following *Marion's* case have not required the presence of all three of the *Marion's* case surgery indicators (invasive, irreversible and major) for court authorisation to be required.<sup>80</sup> If circumcision is characterised by a court as minor it will be a factor that is likely to be weighed against the need for compulsory court authorisation. However, of more importance in each case is: the significant risk of making a wrong decision; and the grave consequences should a wrong decision be made.

### **The Significant Risk of Making the Wrong Decision**

Three matters in particular may weigh upon a court's consideration of whether there is a significant risk of making a wrong decision to authorise the circumcision of an incapable minor. The first is that most healthy children will acquire the capacity and maturity to determine their preferred circumcision status themselves later in life. Courts have generally shown a reluctance to pre-empt a choice about a procedure that can be delayed without substantial loss or cost until the minor is able to decide the matter themselves.<sup>81</sup> Courts are likely to show this reluctance in recognition of the difficulty in accurately predicting whether the best interests of a young child truly warrant an irreversible and non-medically necessary alteration of their genitals before the child has developed their own views on the procedure.

Secondly, the ethical, medical, psychological and legal issues involved in any decision to circumcise a child may make it desirable to shift the question of authorisation from the medical,

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<sup>77</sup> Haberfield has noted that foreskin restoration procedures may reverse some of the effects of a circumcision, see: Les Haberfield, 'Responding to Male Circumcision: Medical or Ritual' (1997) 4 *Journal of Law and Medicine* 379, 383. However, it seems that an unaltered foreskin has special qualities that cannot be reproduced once it is excised, (see discussion from page 17), and the procedure is, for this reason, properly regarded as irreversible.

<sup>78</sup> *Ibid* 382-383.

<sup>79</sup> *Ibid*.

<sup>80</sup> Different conclusions have been reached previously upon whether a bone marrow transplant (which is invasive but not irreversible) is a special medical procedure. See: *Re GWW and CMW* (1997) 21 FamLR 612. *Contra: Re Inaya (Special Medical Procedure)* [2007] FamCA 658 (Unreported, Cronin J, 27 June 2007).

<sup>81</sup> See for example: *Re S* [2005] 1 FLR 236.

religious, or cultural decision-making forum, where the decision to circumcise is usually made, to the courts. Circumcision is not solely a medical question, nor is it ever strictly a religious or cultural question. Experts in particular fields, like medicine or religion, may be more likely to fail to give due consideration to matters outside their particular area of expertise than courts when considering the best interests of a particular child. The sensitive, ethically contentious, and multifaceted nature of infant circumcision may suggest that a decision as to the best interests of the child might be better ensured if a court is made the final arbiter.<sup>82</sup>

Finally, court involvement may be appropriate and necessary to ensure that all the views of the interested parties concerned, including parents, family and others close to the child are properly considered,<sup>83</sup> and that ultimately the child's interests prevail. It is a fact that the decision to circumcise a child, like the decision to sterilise a child, 'can involve not only the interests of the child, but also the independent and possibly conflicting (though legitimate) interests of the parents and other family members'.<sup>84</sup> The presence of parental disagreement in particular is a strong indicator of the need for authorisation by a court. Disagreement between parents will almost certainly require court intervention to determine whether the procedure is in the child's best interests. In a case involving parental disagreement Justice Wall in *Re J* agreed with the proposition that:<sup>85</sup>

where more than one person shares parental responsibility, no one holder of parental responsibility should be able to have an incompetent child circumcised against the wishes of any of the others. Thus where there is a disagreement between holders of parental responsibility about the circumcision of a male child, circumcision should not be carried out without the leave of the court.

That conclusion was affirmed by the English Court of Appeal.<sup>86</sup> Former Chief Justice Nicholson of the Family Court of Australia has also suggested that court authorisation ought to be sought wherever there is a dispute between guardians over any procedure which is invasive and non-therapeutic.<sup>87</sup>

It cannot be said with certainty whether or not the risk of making a wrong decision, at least when there is parental agreement, will be deemed by a court to be sufficiently significant to always require court authorisation for a circumcision. However, it seems that there is a strong possibility that court authorisation will be required in some circumstances that indicate a heightened risk of a wrong decision being made (such as when there is parental disagreement).

### **The Consequences of a Wrong Decision are Particularly Grave**

Some of the certain and potential costs of circumcision were discussed in chapter two (see discussion from page 16). Circumcision seems to involve as grave, if not graver consequences than many regenerative tissue donation procedures, which have previously been held to be special

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<sup>82</sup> A similar argument was accepted in *Marion's* case, see: *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 250-251 (Mason CJ, Deane, Toohey and Gaudron JJ).

<sup>83</sup> This was accepted as a factor in *Marion's* case, see: *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 250-251 (Mason CJ, Deane, Toohey and Gaudron JJ).

<sup>84</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 250-251 (Mason CJ, Deane, Toohey and Gaudron JJ).

<sup>85</sup> *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)* [1999] 2 FCR 345, 369 (Wall J).

<sup>86</sup> *Re J (Child's Religious Upbringing and Circumcision)* [2000] 1 FCR 307, [21] (Thorpe LJ), [30] (President Butler-Sloss).

<sup>87</sup> Victorian Legal Aid, *A Question of Right Treatment: The Family Court and Special Medical Procedures for Children an Introductory Guide for use in Victoria* (1998) viii.

medical procedures.<sup>88</sup> Even if a court considers the physical loss following circumcision negligible, which is not something that can be accepted without question, the social and psychological effects of a wrong decision can be devastating. The significance of the impact of the perception of being acted upon against one's wishes, or best interests, is particularly important in the context of irreversible procedures performed on people in childhood. In jurisdictions like the Australian Capital Territory, the Northern Territory, Tasmania, Victoria and Western Australia, where the circumcision rate is extremely low, this pain may be exacerbated in men who experience ridicule or social awkwardness because their penis differs notably from that of the vast majority of their peers. The high profile cases of attempted suicide, and suicide, around the world, including in Australia, of men forced to live with lasting and devastating complications of a circumcision performed on them as a child are an extreme illustration of the possible negative consequences of circumcision.<sup>89</sup>

For other men, their circumcision status is an important part of their identity. Circumcision can be a mark that identifies them with something important in their life (their father, their community, or their faith, for example). A failure to be circumcised can have significant consequences for the relationships in some men's lives. For example, the traditional penalty for not circumcising a male child on the eighth day of life in the Jewish faith is *Karet*, the excision of the person from the religious community.<sup>90</sup> Consequences for either decision, to circumcise or not to circumcise, may be particularly grave for the child concerned. Whether a court will consider the chance of such grave consequences occurring as sufficient to require court authorisation for all non-therapeutic circumcisions is uncertain.

## 4.4 Who May Challenge a Parental Decision?

The decision to circumcise, as a potential issue in the exercise of parental responsibility and as an aspect of the care, welfare and development of the child, may possibly be the subject of an *FLA* parenting order. A parenting order provides direction to a parent to act in what the court considers the best interests of the child.<sup>91</sup> Decisions that involve major long-term issues, which include issues about the care, welfare and development of the child, including their health, religious or cultural upbringing, must ordinarily be made jointly by parents who are subject to a parenting order.<sup>92</sup> The decision to circumcise a child is almost certainly a decision regarding a major long-term issue.

A parenting order may be applied for by the child's parents, the child himself (the *FLA* provides that an Independent Children's Lawyer may be appointed by a party, or on the court's initiative, if it is in the child's best interests),<sup>93</sup> a grandparent of the child, or any other person concerned with the care, welfare or development of the child.<sup>94</sup> If a parenting order is breached, the court may

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<sup>88</sup> *Re Inaya (Special Medical Procedure)* [2007] FamCA 658 (Unreported, Cronin J, 27 June 2007).

<sup>89</sup> For an Australian example see: Shane Peterson, *Assaulted and Mutilated: Shane Peterson's Account of Circumcision Trauma* (2006) Circumcision Information Australia <<http://www.circinfo.org/account.html>> at 20 October 2010. For David Reimer's harrowing life story after his botched circumcision, see: John Colapinto, *As Nature Made Him: The Boy Who Was Raised as a Girl* (2000).

<sup>90</sup> Genesis 17:14.

<sup>91</sup> *Family Law Act 1975* (Cth) s 60CA; *Family Court Act 1997* (WA) s 66A.

<sup>92</sup> *Family Law Act 1975* (Cth) s 4(1); *Family Court Act 1997* (WA) s 7A(1). The last major round of family law reform in Australia encouraged co-operative parenting as one of its aims, see: *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676.

<sup>93</sup> *Family Law Act 1975* (Cth) s 68L(2); *Family Court Act 1997* (WA) s 164.

<sup>94</sup> *Family Law Act 1975* (Cth) s 65C; *Family Court Act 1997* (WA) s 88.

make an order requiring the defaulting party to attend an approved parenting program.<sup>95</sup> The court may also order that the innocent party be compensated for having to bring an action for the breach of the parenting order.<sup>96</sup> More serious penalties, which include fines and imprisonment, can be ordered by the court for serious breaches of parenting orders.<sup>97</sup>

If, in the particular instance, the decision to circumcise does not come within the ordinary scope of parental power, it is necessary for the person seeking the circumcision (and presumably the person who is to perform the circumcision) to apply for court authorisation. A parent, a grandparent, the child himself or any other person concerned with the care, welfare or development of the child may also bring an action under the court's welfare power to determine whether a proposed circumcision is in the best interests of the child.<sup>98</sup>

## 4.5 Critical Analysis

This section critiques the form of the private law governing the lawful authorisation of a circumcision, and considers the law from the perspective of the relevant conceptual influences.

### The Form of the Law

It is not clear whether the circumcision of an incapable minor must be authorised by a court or not. It is likely that at least some circumcisions performed on incapable minors will require court authorisation. However, neither case law nor legislation provides detailed guidance on precisely when court authorisation may be required. There are no uniform national standards which prescribe the circumstances in which children may be circumcised.<sup>99</sup> Until the circumstances in which court authorisation is required become clear, by virtue of clarifying legislation or judicial precedent, circumcisers and parents cannot know with certainty whether they are able to legally circumcise an infant without first seeking court authorisation.

A regulatory scheme for circumcision requiring judicially mandated court approval is also likely to be difficult to enforce. The enforceability of court authorisation is already a problem in the context of sterilisation. Only seventeen sterilisations of mentally disabled women were authorised by courts (or legislatively established tribunals) in the first five years following *Marion's* case.<sup>100</sup> However, apparently hundreds of sterilisations, most of which ought to have been authorised by a court or tribunal, were performed during this five year period.<sup>101</sup> Reviews of the merit of

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<sup>95</sup> *Family Law Act 1975* (Cth) s 70NEB; *Family Court Act 1997* (WA) s 205O.

<sup>96</sup> *Family Law Act 1975* (Cth) s 70NEB; *Family Court Act 1997* (WA) s 205O.

<sup>97</sup> *Family Law Act 1975* (Cth) s 70NFB; *Family Court Act 1997* (WA) s 205SB.

<sup>98</sup> *Family Law Act 1975* (Cth) s 69C; *Family Court Act 1997* (WA) s 185. Orders for the welfare of ex-nuptial children may still have to be made under the *parens patriae* jurisdiction of the Supreme Courts, see discussion from page 81.

<sup>99</sup> The lack of uniform national standards for when sterilisations may be performed has previously been criticised by the Family Law Council. See: Family Law Council, *Sterilisation and Other Medical Procedures on Children: A Report to the Attorney-General* (1994).

<sup>100</sup> Susan Brady and Sonia Grover, *The Sterilisation of Girls and Young Women in Australia - A Legal, Medical and Social Context* (1997) 127.

<sup>101</sup> There is no agreement on the precise number of improperly authorised sterilisations that were performed in the five years following *Marion's* case. One estimate has suggested over 1000, see: *Ibid.* A more conservative estimate of 202 was cited by the Federal Minister for Health at the time, see: Danny Sandor, 'Sterilisation and Special Medical Procedures on Children and Young People - Blunt Instrument? Bad Medicine?' in Ian Freckelton and Kerry Petersen (eds), *Controversies in Health Law* (1999) 19.

mandatory court authorisation for sterilisation procedures have suggested that parents and practitioners were, and are still, often willing to eschew the mandated court authorisation.<sup>102</sup>

Parents who want their child circumcised, and who are able to find a circumciser willing to perform the procedure, are perhaps even more likely to proceed without a legally mandated court authorisation process than parents considering the sterilisation of their mentally disabled child. This is because parents and circumcisers have an incentive to avoid the process of court authorisation because circumcision is a relatively simple, cheap and quick operation that can be performed without attracting significant attention; it can still be easily explained away by physicians as being a therapeutic procedure; and, the process of acquiring court authorisation is disproportionately costly and time consuming compared to the cost of and speed at which an unauthorised circumcision may be performed.<sup>103</sup>

### Conceptual Analysis

This subsection considers the law from the perspective of the conceptual influences of religion, ethnicity, health, autonomy, and naturalism.

The best interests of the child approach utilised under Australian family law allows courts to consider the religious beliefs of parents, the religious beliefs of the child themselves, and the potential importance of a religious circumcision to a child to be raised in a religious family or community.<sup>104</sup> However, the best interests approach does not make religion a predominant consideration. Religious and spiritual beliefs are not even specifically mentioned in the section which describes how a court ought to determine what is in a child's best interests.<sup>105</sup> Religion is but one factor among many and not even an expressly included factor that a parent or court ought to consider when determining whether a circumcision is in a child's best interests.

The best interests of the child approach is also child centred, and does not give substantial weight to the religious interests of a minor's parent. A parent's or both parents' religious beliefs will not ordinarily trump the beliefs (whether they be religious in nature or not) of the child themselves.<sup>106</sup> Two judicial decisions in England suggest that the performance of a religious circumcision is unlikely to be authorised by a court as being in the best interests of the child in circumstances where one parent opposes the circumcision, the child has not expressed an opinion in favour of the matter, and the child is likely to be raised in a secular fashion (see discussion from page 82).<sup>107</sup>

Although the best interests approach allows courts to consider religion, and may offer considerable protection under law to a person who performs a religious circumcision on a child capable of consenting to the procedure themselves, proponents of religious circumcision will probably consider the protection offered by the law to religious circumcision as insufficient.

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<sup>102</sup> For a discussion on how the number of sterilisations performed has far exceeded the number of sterilisations properly authorised see: Susan Brady, John Britton and Sonia Grover, *The Sterilisation of Girls and Young Women in Australia: Issues and Progress* (2001).

<sup>103</sup> Some of these issues were recognised in *Marion's* case, see: *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 253 (Mason CJ, Deane, Toohey and Gaudron JJ).

<sup>104</sup> *Family Law Act 1975* (Cth) ss 60CC (3)(g), (m); *Family Court Act 1997* (WA) ss 66C(3)(g), (m).

<sup>105</sup> *Family Law Act 1975* (Cth) s 60CC; *Family Court Act 1997* (WA) s 66C.

<sup>106</sup> The views of the child are recognised as important in both Australian family law and human rights law in the determination of the child's best interests, see: *Family Law Act 1975* (Cth) s 60CC(3)(a); *Family Court Act 1997* (WA) s 66C(3)(a); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 12 (entered into force 2 September 1990).

<sup>107</sup> *Re J (Child's Religious Upbringing and Circumcision)* [2000] 1 FCR 307; *Re S* [2005] 1 FLR 236.



Proponents of religious circumcision would prefer religion to be a predominant consideration in the determination of the best interests of a child. They may even regard the best interests of the child approach, with the risk of the presence of ethnocentrism in judicial determination, as an entirely unsatisfactory way of protecting the practice of religious circumcision in minority groups in particular.

Ethnicity motivated circumcision is, like religious circumcision but perhaps even more so, given some protection by the best interests approach employed in Australian family law. The approach directs the court to consider the 'lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents', and in regard to Indigenous Australian circumcision, the right of Indigenous Australian children to explore their culture to 'the full extent'.<sup>108</sup> These factors must be considered by a decision maker determining the best interests of a child. However, none of these factors need necessarily to be given precedence over any other in a court's determination of the best interests of the child. Proponents of ethnicity related circumcision may, like proponents of religious circumcision, have concerns about courts being ethnocentric in their decision making.

Proponents of health in the circumcision debate may also take issue with the best interests of the child test at family law. It is likely that some circumcisions, and some other forms of genital modification in particular, will not, by virtue of their nature, or the method used to perform them, be held by a court to be in the best interests of a particular child. However, the law does not set clear health and safety standards for circumcisers. It also fails to give firm guidance on whether a relatively minor procedure with potential prophylactic benefits can be characterised as a special medical procedure.

The law discussed in this chapter offers considerable protection to the autonomy of adults and minors with sufficient capacity to consent to their own circumcision. The family law best interests of the child guide to decision making even expressly requires parents and courts to consider the views expressed by the child when determining whether a decision is in a child's best interests.<sup>109</sup> Proponents of the future orientated consent approach to protecting the autonomy of incapable minors will generally support the operation of the family law's best interests of the child formulation. It imports a form of future orientated consent decision making into the determination of matters affecting incapable children. Proponents of the minimalist approach to autonomy will be less likely to endorse the best interests of the child formulation. Proponents of the approach will not support the law to the extent that it allows non-therapeutic circumcisions to be performed lawfully on incapable minors. Proponents of each approach to protecting the autonomy of incapable minors will approve of both the availability of an avenue through which the decision making of parents on behalf of their children may be challenged, and of mandated court authorisation in certain circumstances as a check on the decision making process. However, the proponents of the different approaches will differ as to when they consider a challenge to a parent's decision making ought to be successful, and they will also probably differ upon when they believe court authorisation ought to be mandatory.

The family law does very little to protect the naturalism of either adults or children. The law allows adults and capable minors to authorise their own circumcision. It also seems to allow parents to authorise the circumcision of their children, presuming the circumcision is lawful under the criminal law, when it is in the child's best interests.

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<sup>108</sup> *Family Law Act 1975* (Cth) s 60CC(3)(g)-(h); *Family Court Act 1997* (WA) s 60C(3)(g)-(h).

<sup>109</sup> *Family Law Act 1975* (Cth) s 60CC(3)(a); *Family Court Act 1997* (WA) s 60C(3)(a).

## 4.6 Concluding Remarks

The previous chapter considered the lawfulness of circumcision under the criminal law. This chapter considered the requirements of a lawful authorisation of a circumcision that is assumed to be lawful under the criminal law. It is the first of two chapters which discuss the private law obligations between circumcisers, the people who authorise circumcisers to perform circumcisions, and the people who have the procedure performed upon them.

The discussion in this chapter showed that an improperly authorised circumcision is a battery. Minors with sufficient understanding and intelligence to enable them to understand fully the nature of their circumcision and its consequences will, like adults, be able to authorise their own circumcision. However, a circumcision of a minor can only be lawfully performed under family law if the procedure is in the particular child's best interests. Any person concerned about the welfare of a child can bring an action to court to have the best interests of the child judicially determined. It is possible, although it cannot be said with certainty, that the circumcision of an incapable minor will always require court authorisation. However, current practice and *obiter dicta* suggest that joint parental agreement is sufficient to authorise a child's circumcision without the need for court approval. Furthermore, the existing court authorisation system would probably be unable to manage the current demand for the circumcision of minors in Australia. Nevertheless, it is likely that court authorisation will be required for non-therapeutic circumcisions of minors performed in particular circumstances, when certain factors are present which increase the chance of a wrong decision being made, such as: when there is parental disagreement; when parent and child disagree; when a minor may not have had their views properly considered; or when there is a potential health contraindication for the procedure. The critical analysis in this chapter suggests that the current authorisation regime is a less than ideal way to regulate circumcision. The law is uncertain and difficult to enforce, and, from the perspective of the main conceptual influences in the circumcision debate, there are deficiencies in the law which a law reformer ought to consider in a review of the relevant law.

The next chapter continues the discussion of the application of the private law most relevant to circumcision. It begins by reviewing the law regulating the advertisement of circumcision services, and the information a circumciser must provide to a person authorising a circumcision. The second half of the chapter analyses some of the more interesting issues of private law that may be relevant to the practice of circumcision in the future, including: whether foreskins can be property, and, whether an illegality defence may bar a person from bringing a successful action for a wrongful circumcision.

## Chapter 5

# Private Law and the Legal Responsibilities of Circumcisers

The activities of a circumciser are not merely a matter of interest to the state. The procedure is, especially for the person circumcised, deeply personal, and the harm of a circumcision, however it may be quantified or characterised, is caused by a private person and experienced by another. Private law governs the interaction between a circumciser and those to whom they provide their service. This law provides the primary means through which wronged individuals may seek redress and compensation. A law reformer considering male circumcision has an obligation to ensure that private law promotes justice and the highest practicable standards of practice between individuals.

This chapter does not provide a comprehensive review of every action potentially applicable to a circumciser's practice. Instead, it provides information and analysis to inform and contextualise the law reform recommended in this thesis. It analyses four key areas of law (misleading and deceptive conduct, battery, negligence, and the law governing the sale of human tissue) to each main stage of a circumciser's practice to highlight the importance of private law to the regulation of circumcision. It also identifies the key areas of private law governing circumcision which may benefit from reform.

The chapter begins by discussing the promotion of a circumciser's service; the information they must provide to a person authorising a circumcision; the standard of care they must meet in the provision of their service; and their use of the excised foreskin. The overarching requirements of an action in negligence (a tort which is relevant to most stages of a circumciser's service), the potential effect of a limitation period, and the potential effect of the illegality defence are then reviewed. The chapter concludes with a critical analysis of the law discussed.

## 5.1 Promotion of the Service

Circumcision can be a commercial enterprise. Australian circumcisers generally provide their service for a fee and under the terms of a contract. Several circumcisers promote their service in Australia. More than a dozen Australian circumcision practitioners advertise their services over the internet.<sup>1</sup> Circumcision advertising, and profit driven circumcision practices, are a reality in

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<sup>1</sup> Mateen Jabbar, *Circumclean* (2010) <<http://www.circumclean.com.au>> at 20 October 2010; Terry Russell, *Russell Medical Centre* (2009) <<http://www.circumcision.com.au/>> at 20 October 2010; Hershel Goldman, *Melbourne Circumcision Centre* (2010) <<http://www.circumcisioncentre.com.au/>> at 20 October 2010; *Circumwise* (2010) <<http://circumwise.com.au/>> at 20 October 2010; Andrew Li, *Drummoyne Surgery & Skin Cancer Clinic* (2010) <[http://www.drummoynesurgery.com.au/circumcision\\_clinic.html](http://www.drummoynesurgery.com.au/circumcision_clinic.html)> at 20 October 2010; Norman Blumenthal, *Circumcision* (2010) Dr Norman Blumenthal Obstetrics and Gynaecology <[http://www.blumenthalclinic.com.au/Content\\_Common/pg-circumcision-procedure-sydney.seo](http://www.blumenthalclinic.com.au/Content_Common/pg-circumcision-procedure-sydney.seo)> at 20 October 2010; Michael Read, *Gold Coast Circumcisions* (2010) <<http://www.gccircumcisions.com.au/>> at 20 October 2010; Paul Cowie, *CircSA* (2010) <<http://circsa.com/>> at 20 October 2010; Hany Ishak, *CircumcisionWA* (2007) <<http://www.circumcisionwa.com.au>> at 20 October 2010; Jeff Tarr, *Queensland Circumcision* (2009) <<http://www.qldcircumcision.com.au/>> at 20 October 2010; Nick Demediuk, *Dr Snip* (2010) <[www.drsnip.com.au](http://www.drsnip.com.au)> at 20 October 2010; Colin Moore, *The Australian Centre for Cosmetic and Penile Surgery*

Australia. Furthermore, with most public hospitals now refusing to perform the procedure, profit driven circumcision practices are likely to continue. Circumcision, like any other potentially lucrative service, is, and should be, regulated by consumer protection law.

Consumer protection law aims to counteract potentially harmful imbalances of power, knowledge, and information between service providers and consumers. The law protects consumers from at least some kinds of misleading, deceitful, or unfair conduct. Imbalances of knowledge and power are likely to exist in the provision of commercial circumcision services. Some circumcisers will be in a position to use their influence or authority, perhaps as a medical professional or as a religious figure, to influence a person's decision making. Some may also, because of the imbalance of knowledge between them and the person authorising the circumcision, be in a position to benefit from improperly influencing a person's decision making by presenting biased or inaccurate information in an authoritative fashion. This section considers the application of one area of consumer protection law, misleading and deceptive conduct, to the promotion of circumcision services.

Misleading and deceptive conduct law is regulated by the Commonwealth's *Trade Practices Act* (TPA),<sup>2</sup> and the state and territory fair trading Acts (the FTAs).<sup>3</sup> These Acts combine and overlap, along with the common law, to govern fair trading in Australia. A circumciser's primary obligation under both the TPA and the FTAs, when promoting their service, is to not engage in conduct that is 'misleading or deceptive or is likely to mislead or deceive'.<sup>4</sup> Misleading conduct is conduct which is capable of inducing error.<sup>5</sup> A defendant does not need to intend to mislead or deceive to be liable under either the TPA or the FTAs.<sup>6</sup> Misleading and deceptive conduct may come in the form of actions, words, or even silence. Courts will consider all the circumstances of a particular case in determining whether there was conduct that was likely to mislead or deceive.<sup>7</sup> They do this by gleaning the overall impression created by the promotional conduct from the perspective of a reasonable person in the promotion's target audience.<sup>8</sup> The law applies to both statements of opinion and of law, as well as to statements of fact. Circumcisers must, for example, when voicing an opinion that may serve to promote their service, actually hold the opinion they give, and ensure they have a reasonable foundation for the opinion they are sharing.<sup>9</sup>

Circumcisers may promote their business. 'Puffery' or flowery and enticing promotional language is not generally regarded as misleading or deceptive conduct.<sup>10</sup> This sort of promotional language is usually in the form of superlatives that no reasonable person could take literally.

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(2006) <[http://www.drcolinmoore.com/acps/other\\_procedures.html](http://www.drcolinmoore.com/acps/other_procedures.html)> at 20 October 2010; Paul Cowie, *Redgum Clinic* (2009) <<http://redgumclinic.com/>> at 20 October 2010.

<sup>2</sup> *Trade Practices Act 1974* (Cth).

<sup>3</sup> *Fair Trading Act 1992* (ACT); *Fair Trading Act 1992* (NSW); *Consumer Affairs and Fair Trading Act 2008* (NT); *Fair Trading Act 1989* (QLD); *Fair Trading Act 1987* (SA); *Fair Trading Act 1990* (Tas); *Fair Trading Act 1999* (Vic); *Fair Trading Act 1987* (WA).

<sup>4</sup> *Fair Trading Act 1992* (ACT) s 12(1); *Fair Trading Act 1987* (NSW) s 42(1); *Consumer Affairs and Fair Trading Act 2008* (NT) s 42(1); *Fair Trading Act 1989* (Qld) s 38(1); *Fair Trading Act 1987* (SA) s 56(1); *Fair Trading Act 1990* (Tas) s 14(1); *Fair Trading Act 1985* (Vic) s 11(1); *Fair Trading Act 1987* (WA) s 10(1).

<sup>5</sup> *Parkdale Custom Built Furniture PTY LTD v Puxu Pty Ltd* (1982) 149 CLR 191.

<sup>6</sup> *Hornsby Building Information Centre Pty Ltd v Sydney Building Centre Limited* (1978) 140 CLR 216, 223 (Stephen J).

<sup>7</sup> *Demagogue Pty Ltd v Ramensky* (1992) 110 ALR 608.

<sup>8</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191.

<sup>9</sup> *Elders Trustee & Executor Co Ltd v Eg Reeves Pty Ltd* (1987) 78 ALR 193.

<sup>10</sup> For a discussion of puffery see: *Sanders v Glev Franchises Pty Ltd* [2002] FCA 1332 (Unreported, Kenny J, 29 October 2002) [270]-[274].

However, courts may be less willing to allow leeway for puffery or unsubstantiated promotional representations when they are used in the promotion of a non-therapeutic and irreversible surgical procedure like circumcision.<sup>11</sup>

Both the Australian Competition and Consumer Commission (ACCC) and private individuals can take action under the *TPA*. An individual who suffers a loss due to misleading or deceptive conduct under the *TPA* can apply for damages,<sup>12</sup> an injunction,<sup>13</sup> or other orders.<sup>14</sup> The ACCC can apply for an injunction,<sup>15</sup> or other orders on behalf of victims of misleading and deceptive conduct.<sup>16</sup> The ACCC can also bring an action for pecuniary penalties.<sup>17</sup> The FTAs allow individuals to apply for injunctions,<sup>18</sup> damages,<sup>19</sup> and other orders for misleading and deceptive conduct.<sup>20</sup> The FTAs also allow courts to impose penalties for some kinds of misleading or deceptive behaviour,<sup>21</sup> including, for example, misleading conduct in relation to the provision of services.<sup>22</sup> This would be relevant to the provision of misleading or deceptive circumcision services.

Circumcisers would be wise to refrain from making exaggerated or unsubstantiated claims when they promote their service. Circumcisers ought to clearly qualify any potentially misleading promotional claim they make. The advice given to doctors by the Australian Medical Association is equally sound for circumcisers:<sup>23</sup>

As a general principle, advertisements should contain only factual material. They must be honest and accurate and should be informative rather than persuasive. Doctors should take care that their advertisements are not likely to exploit patients' vulnerability or lack of medical knowledge.

There appear to be no blatant examples of misleading or deceptive conduct in current Australian circumcision promotional material.<sup>24</sup> No reported misleading or deceptive conduct actions have

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<sup>11</sup> Australian Competition and Consumer Commission, *Fair Treatment Guide to the Trade Practices Act for the Advertising or Promotion of Medical and Health Services* (2000) 10.

<sup>12</sup> *Trade Practices Act 1974* (Cth) s 82(1). However, a person who suffers loss or damage from a personal injury due to misleading or deceptive conduct under the *TPA* may not recover the amount of the loss or damage unless the personal injury resulted from the use of tobacco products. See: *Trade Practices Act 1974* (Cth) s 82(1AAA).

<sup>13</sup> *Trade Practices Act 1974* (Cth) s 80.

<sup>14</sup> *Trade Practices Act 1974* (Cth) s 87.

<sup>15</sup> *Trade Practices Act 1974* (Cth) s 80.

<sup>16</sup> *Trade Practices Act 1974* (Cth) s 87.

<sup>17</sup> *Trade Practices Act 1974* (Cth) ss 76(1), 77.

<sup>18</sup> *Fair Trading Act 1992* (ACT) s 44; *Fair Trading Act 1992* (NSW) s 65; *Consumer Affairs and Fair Trading Act 2008* (NT) s 89; *Fair Trading Act 1989* (QLD) s 96; *Fair Trading Act 1987* (SA) s 83; *Fair Trading Act 1990* (Tas) s 34; *Fair Trading Act 1999* (Vic) s 149; *Fair Trading Act 1987* (WA) s 76. *Fair Trading Act 1990* (Tas) s 34;

<sup>19</sup> *Fair Trading Act 1992* (ACT) s 46; *Fair Trading Act 1992* (NSW) s 68; *Consumer Affairs and Fair Trading Act 2008* (NT) s 91; *Fair Trading Act 1989* (QLD) s 99; *Fair Trading Act 1987* (SA) s 84; *Fair Trading Act 1990* (Tas) s 37; *Fair Trading Act 1999* (Vic) s 159; *Fair Trading Act 1987* (WA) s 79.

<sup>20</sup> *Fair Trading Act 1990* (Tas) s 41; *Fair Trading Act 1992* (ACT) s 50; *Fair Trading Act 1992* (NSW) s 72; *Consumer Affairs and Fair Trading Act 2008* (NT) s 95; *Fair Trading Act 1989* (QLD) s 100; *Fair Trading Act 1987* (SA) s 85; *Fair Trading Act 1990* (Tas) s 34; *Fair Trading Act 1999* (Vic) s 158(3); *Fair Trading Act 1987* (WA) s 77.

<sup>21</sup> See for example: *Fair Trading Act 1992* (ACT) s 41; *Fair Trading Act 1987* (NSW) s 62; *Consumer Affairs and Fair Trading Act 2008* (NT) s 88; *Fair Trading Act 1989* (QLD) s 40; *Fair Trading Act 1987* (SA) s 75; *Fair Trading Act 1990* (Tas) s 14; *Fair Trading Act 1999* (Vic) s 11; *Fair Trading Act 1987* (WA) s 79.

<sup>22</sup> For an example, see: *Fair Trading Act 1992* (ACT) s 20.

<sup>23</sup> Australian Medical Association, *Advertising and Public Endorsement Position Statement* (2006) 1.

<sup>24</sup> This was ascertained by reviewing the promotional material freely available online.

been brought against circumcisers. However, potentially misleading or deceptive statements are relatively common in circumcision promotional material. These statements are sometimes in the form of unsubstantiated and disputable assertions of fact, which, as might be expected, are relatively common in any promotional material which refers to information on the complicated relationship between circumcision and health.<sup>25</sup> Some statements have the potential to be misleading because of their phrasing rather than any particular fact asserted. A statement included in an online promotion of an Australian circumcisers' service reads for example:<sup>26</sup>

Foreskin is common in both many young boys and male adults. While it is not classified as a disease however, it is frequently associated with conditions such as phimosis, balanitis and rarely penile cancer.

Another statement, included in an information brochure offered on many circumcision service websites, reads:<sup>27</sup>

Circumcision confers a lifetime of benefits. 1 in 3 uncircumcised boys will develop a condition requiring medical attention. This means various degrees of suffering and some deaths.

The phrasing and overall impression given by these statements, rather than any particular claim made, tends towards a reading that is potentially misleading. The statements may be read as implying that the foreskin is something uncommon or abnormal, that its presence is, or at least may commonly be, significantly detrimental to health and comfort, and that a foreskin is perhaps best regarded as a health concern akin to a disease. This characterisation of what is a normal and healthy part of the male anatomy, disseminated on websites promoting a foreskin removal service, is potentially misleading.

## 5.2 The Provision of Information

The decision to have a circumcision performed is not a decision which should be taken lightly. Sound decision making can only be based upon sound information. Private law plays an important part in regulating the provision of information from a circumciser to a person authorising a circumcision. The provision of information is an area in which a circumciser owes a duty to a person authorising a circumcision. This section highlights the role private law has in ensuring that some significant decisions, like the decision to have a circumcision performed, are only made after an effort has been made by a service provider to inform the consumer of information relevant to the decision they are to make. The section discusses the application of the torts of battery and negligence to the provision of information by a circumciser.

### Duty to Provide Basic information

A circumciser must provide information in broad terms about the nature of the procedure to avoid liability for battery.<sup>28</sup> This information must be provided to the person, or people, responsible for authorising the procedure. Very little information would need to be provided to avoid liability in battery. A circumciser would probably only have to explain that the operation will be likely to result in pain and an excision of some of the foreskin. Consequently, an action in battery is only

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<sup>25</sup> See discussion from page 12.

<sup>26</sup> Andrew Li, *Drummoyne Surgery & Skin Cancer Clinic* (2010) <[http://www.drummoynesurgery.com.au/circumcision\\_clinic.html](http://www.drummoynesurgery.com.au/circumcision_clinic.html)> at 20 October 2010.

<sup>27</sup> Brian Morris, *Circumcision: A Guide for Parents* (2006) 5.

<sup>28</sup> *Rogers v Whitaker* (1992) 175 CLR 479, 490 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).

likely to arise when the procedure is forced upon a person capable of refusing the procedure, or when the procedure is performed without there being prior consultation and authorisation between the circumciser and the person responsible for authorising the procedure.

An action in battery for a circumcision has not yet been reported in any Australian superior court.<sup>29</sup> However, actions in battery have been brought against circumcisers in foreign jurisdictions. They have, apart from physical attacks involving circumcision forced upon a non-consenting adult, been brought in two distinct circumstances.<sup>30</sup> The first circumstance, the more common, involves the circumcision of a child without either the consent of the child, or the authorisation of the child's parents. Circumcisions of this kind are usually performed by mistake in hospitals where it is the norm for newborn babies to be circumcised. Several actions in these circumstances have been brought since at least the mid-twentieth century in the United States.<sup>31</sup> Actions of this kind have also been brought in the twenty-first century.<sup>32</sup> These actions have not proved to be straightforward because of various legal technicalities and evidentiary problems specific to the jurisdiction and the factual circumstances.<sup>33</sup> However, the application of the relevant law in Australia is not overly complicated in principle.

The second circumstance in which an action in battery has been considered overseas involves the circumcision of people who are under anaesthesia, and who have not given their prior consent to the procedure. Circumcisions in this situation are usually performed for one of two reasons: by mistake; or because the surgeon treating the anaesthetised patient believed it would be in the patient's best interests. A highly publicised instance of the latter case occurred in 2008 when fifty-year-old Karl Spandl was taken to hospital in Germany after a painful abscess developed on his penis.<sup>34</sup> During the operation to treat the abscess the operating surgeon chose to perform a circumcision, a procedure which was never discussed with Mr Spandl. The surgeon believed the surgery would minimise the risk of future complications. Mr Spandl was quoted as saying after the procedure:<sup>35</sup>

When I woke up I almost passed out again with shock. I never said they could take that, and now I have almost no feeling in the tip – my sex life has been totally ruined.

The reports suggested that Mr Spandl began an action against his doctor for the circumcision. Actions in battery for a circumcision performed in this sort of circumstance have also been

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<sup>29</sup> This was ascertained by reviewing electronic databases of both reported and unreported cases (including Austlii and Lexis Nexis).

<sup>30</sup> Men abducted and forcibly circumcised have brought actions in South Africa, see: Thanduxolo Jika, 'Forcible Circumcision Outlawed', *The Weekend Post* (South Africa) 4 November 2009 <<http://www.weekendpost.co.za/article.aspx?id=484589>> at 20 October 2010.

<sup>31</sup> See for example: *Noe v Kaiser Foundation Hospitals*, 435 P 2d 306 (Or 1967); *Kalina v General Hospital of Syracuse*, 220 NYS 2d 733 (NY 1961); *Kalina v General Hospital of Syracuse*, 233 NYS 2d 808 (NY 1962). For a discussion of these cases see: David Llewellyn, 'Legal Remedies for Penile Torts' (1995) 40 *The Complete Mother* 16; David Llewellyn, 'Some Thoughts on Legal Remedies' in George Denniston, Frederick Hodges and Marilyn Milos (eds), *Male and Female Circumcision Medical, Legal, and Ethical Considerations in Pediatric Practice* (1999) 471.

<sup>32</sup> See for example: 'Baby Circumcised by Accident' (2010) *The Australian* (Australia) 15 September 2010 <<http://www.theaustralian.com.au/news/breaking-news/baby-circumcised-by-accident/story-fn3dxity-1225923735846>> at 20 October 2010.

<sup>33</sup> See for example: *Kalina v General Hospital of Syracuse*, 220 NYS 2d 733 (NY 1961); *Kalina v General Hospital of Syracuse*, 233 NYS 2d 808 (NY 1962); *Wilson v Landry* 748 So 2d 655 (La 1<sup>st</sup> Cir 1999).

<sup>34</sup> 'Man Sues Doctor for New Foreskin', *Metro News* (United Kingdom) 4 December 2006 <[http://www.metro.co.uk/weird/article.html?in\\_article\\_id=27769&in\\_page\\_id=2](http://www.metro.co.uk/weird/article.html?in_article_id=27769&in_page_id=2)> at 20 October 2010.

<sup>35</sup> *Ibid.*

brought in both England and the United States.<sup>36</sup> It has been difficult to succeed in actions in these circumstances in the United States. Again, however, the application of the law in Australia in these circumstances is relatively simple in principle.

### **Duty to Provide Material Information**

This section discusses the standard of care in the provision of information required of a circumciser under negligence law. The other requirements for a finding of negligence are discussed below (see discussion from page 105).

The law of negligence is governed by the common law and civil liability legislation in each state and territory in Australia.<sup>37</sup> Circumcisers are required under negligence law to exercise reasonable care and skill in the provision of their service. This includes care and skill in the provision of information about the service they are to provide. The majority of the High Court in a joint judgment in *Rogers v Whitaker* held that, dealing with the question of the proper disclosure of risks by a doctor at common law:<sup>38</sup>

The law should recognise that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.

Information a person is 'likely to attach significance to' has been, generally,<sup>39</sup> treated by the courts as being information 'relevant to' or that 'might influence' their decision to undergo the particular operation or treatment.<sup>40</sup> The High Court in *Rogers v Whitaker* approved the comments made by the Court in the South Australian decision of *F v R* that in determining what information was material at common law, a medical professional must take into account factors including:<sup>41</sup>

the nature of the matter to be disclosed; the nature of the treatment; the desire of the patient for information; the temperament and health of the patient; and the general surrounding circumstances.

The general principle supporting the decision in *Rogers*, that a person ought to know all the information that may influence their decision to undergo a procedure, suggests a much wider duty than the mere provision of information about risks of a procedure by a health professional. This has since been affirmed in *obiter dicta* comments in the High Court decision of *Rosenberg v Percival*.<sup>42</sup> For example, health professionals may have a duty to inform their patients of

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<sup>36</sup> See Justice Bristow's discussion of such a case in: *Chatterton v Gerson* [1981] 1 All ER 257, 265. See also: *Banks v Wright*, 721 So 2d 1063 (La Ct App 1998).

<sup>37</sup> See: *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Civil Liability Act 2003* (Qld); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

<sup>38</sup> *Rogers v Whitaker* (1992) 175 CLR 479, 490 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).

<sup>39</sup> Justice Gummow has also suggested that the term means 'would have been likely seriously to consider and weigh up the risk': *Rosenberg v Percival* (2001) 205 CLR 434, [80].

<sup>40</sup> *F v R* (1983) 33 SASR 189, 192 (King CJ); *Rogers v Whitaker* (1992) 175 CLR 479, 494 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).

<sup>41</sup> *F v R* (1983) 33 SASR 189, 192 (King CJ); *Rogers v Whitaker* (1992) 175 CLR 479, 488 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).

<sup>42</sup> *Rosenberg v Percival* (2001) 205 CLR 434, 465 (Kirby J).



information about the breadth of the acceptance and practice of a particular surgery, and the availability of alternative surgeries.<sup>43</sup>

The civil liability Acts in Tasmania and Queensland reflect the decision in *Rogers v Whitaker* in regard to some health professionals. The legislation requires the consideration of both the information needs of the reasonable patient and the information needs of the particular patient they are treating, when providing information as to risks. A 'medical practitioner' in Tasmania,<sup>44</sup> and a 'doctor' in Queensland,<sup>45</sup> will not breach a duty to warn of a risk where they have provided:

- (a) information that a reasonable person in the patient's position would, in the circumstances, require to enable the person to make a reasonably informed decision about whether to undergo the treatment or follow the advice;
- (b) information that the registered medical practitioner (in Tasmania) or doctor (in Queensland) knows or ought reasonably to know the patient wants to be given before making the decision about whether to undergo the treatment or follow the advice.

The civil liability Acts do not alter the common law in regard to the provision of information as to warnings, advice and risks, for 'professionals' generally.<sup>46</sup> Who is a 'professional' for the purposes of the law will be discussed in more detail shortly (see discussion from page 103). Australian law does not provide much guidance as to the duty of non-medical professionals to inform of risks, or any other matter, under negligence law. Most circumcisers profess to have some skill at circumcising in a safe and aesthetically pleasing manner. Ordinarily, under common law, the standard of reasonable care and skill required of a person professing to have certain skills is that of the ordinary skilled person exercising and professing to have that special skill.<sup>47</sup> It is likely, although it cannot be said for certain, that most skilled non-medical circumcisers will have a duty to inform of risks similar to that of medical professionals.

The particular duty of a circumciser is a matter to be determined by the court in the particular circumstances. For example, a person who does not profess to have any particular skill at circumcising, and who is known to the person authorising the circumcision to be a layperson, may not be held to the standard of a professional circumciser.<sup>48</sup> A person professing to have special skill, but perhaps not the level of skill that a surgeon may have, may be held to a standard which is different from both a surgeon and a layperson. Justice Goddard in *Phillips v William Whiteley Ltd*, a case which discusses the duty of a jeweller who pierces ears, illustrates this point in the following portion of his judgment:<sup>49</sup>

I do not think that a jeweller holds himself out as a surgeon or professes that he is going to conduct the operation of piercing a lady's ears by means of aseptic surgery, about which it is not to be supposed that he knows anything. If a person wants to ensure that the operation of piercing her ears is going to be carried out with that proportion of skill and so forth that a Fellow of the Royal College of Surgeons would use, she must go to a surgeon. If she goes to a jeweller, she must expect that he will carry it out in the way that one would expect a jeweller to carry it out.

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<sup>43</sup> *Hall v Petros* [2004] WADC 87 (Unreported, Macknay DCJ, 27 May 2004).

<sup>44</sup> *Civil Liability Act 2002* (Tas) s 21.

<sup>45</sup> *Civil Liability Act 2003* (Qld) s 21.

<sup>46</sup> See: *Civil Liability Act 2002* (NSW) s 5P; *Civil Liability Act 2003* (Qld) s 22; *Civil Liability Act 2002* (Tas) s 22(5); *Wrongs Act 1958* (Vic) s 60; *Civil Liability Act 2002* (WA) s 5P.

<sup>47</sup> *Rogers v Whitaker* (1992) 175 CLR 479, 483 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).

<sup>48</sup> *Blackmore v Beames* [1993] SASC 92-709 (Unreported, King CJ, Cox and Matheson JJ, 8 February 1993).

<sup>49</sup> *Phillips v William Whiteley Ltd* [1938] 1 All ER 566, 569.

It seems possible that the scope of the duty expected of a circumciser, even in the provision of information as to risks, may be directly proportional to the skill and knowledge the circumciser professes to have. A person having a traditional Indigenous Australian bush circumcision performed by a traditional practitioner will probably not be provided with the same depth of information as provided within a conventional medical facility, and it seems that the law may not require the provision of the same depth of information in the circumstances.

The law has not determined a minimum standard set of risks that must be disclosed by a health professional, or any other circumciser, before the performance of a circumcision. In practice, the unlikelihood of the risk occurring is effectively never regarded by the courts as a particularly significant factor by itself in the determination of whether a risk of a procedure ought to be raised.<sup>50</sup> Australian courts have previously found a duty to warn of risks that were as rare as 1 in 14,000 and 1 in 10,000,<sup>51</sup> and which had only been discussed and described in medical theory as 'very rare'.<sup>52</sup> So, although some possible risks of circumcision, including the loss of the penis and death, are very rare, occurring perhaps only once in tens of thousands of cases in Australia, circumcisers would be wise not to ignore them entirely when informing their patient about the risks of the procedure. The duty to warn of rare or peculiar risks is particularly likely to be enlivened if the person to be informed of the information is very wary about the procedure, or is not strongly motivated to have the procedure performed. Les Haberfield suggests in regard to circumcision that it may be that, because of the elective nature of the procedure, a circumciser may have an even more detailed duty to inform of risks in some circumstances than that of a health service provider performing therapeutic surgery.<sup>53</sup>

### **The Effect of Consent or Authorisation Forms**

A well-drafted and signed patient authorisation form will strongly support a doctor's claim that they had sufficiently informed the person authorising the circumcision. Claims in battery have been brought, but have proved difficult to establish, in foreign jurisdictions when a signed consent form exists.<sup>54</sup> A particularly well-drafted form will acknowledge: the nature of the procedure proposed; the risks of the procedure; the concerns of the particular patient; and how the particular patient's concerns have been addressed. This information will, if detailed enough, make a successful claim in battery or negligence for insufficient provision of information difficult.

However, documents cannot replace the provision of person to person consultation time designed to ensure that a patient understands the appropriate information. A signed authorisation form, or the provision of an information brochure to a patient, is not conclusive evidence that adequate information has been provided, or that a person has authorised the procedure with sufficient knowledge of the relevant information. Documents may not be read properly by the person authorising the procedure, may be lacking in key information, may not be patient or procedure specific enough, or may use technical or convoluted language that ought to be explained to the patient in person.<sup>55</sup> The person authorising the procedure may also have been mistaken or misled as to the nature of the form, may have been unable to comprehend the information in the form, or

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<sup>50</sup> Thomas Addison, 'Negligent Failure to Inform' (2003) 11 *Torts Law Journal* 165, 172.

<sup>51</sup> *Shed v Hooley* [2000] NSWCA 362 (Unreported, Mason P Beazley JA Davies AJA, 14 December 2000).

<sup>52</sup> *Chappel v Hart* (1998) 195 CLR 232.

<sup>53</sup> Les Haberfield, 'Informed Consent and Infant Male Circumcision' (Paper presented at the Australasian Law Teachers Conference, Sydney, 3 October 1997). This proposition has received some judicial support, see: *Tekanawa v Millican* (1994) BrisDC 1219-92 (Unreported, Botting DCJ, 11 February 1994) 43-44.

<sup>54</sup> See for example: *Flatt v Kantak*, 687 NW 2d 208 (ND 2004).

<sup>55</sup> *Shaw v Langley* [1993] QDC 485/91 (Unreported, Pratt DCJ, 24 November 1993). This case is discussed in: Thomas Addison, above n 50.

may not have understood the potential enormity of providing their signature for various other reasons, such as illiteracy, poor health, or intoxication.

### **The Provision of Information: Summary**

Circumcisers must provide both a broad description of the procedure, and, at least some of the information relevant to the decision to authorise a circumcision to the person who is to authorise the circumcision they perform. Circumcisers must, for example, provide information as to the most significant risks of the procedure. The information that ought to have been provided by the circumciser must be determined in light of the particular circumstances. This duty may well differ between circumcisers and in different circumstances.

## **5.3 Proper Authorisation**

Circumcisers have a duty to ensure that they are properly authorised to perform any circumcision they perform. Without lawful authorisation, the person circumcised will be entitled to claim for battery. A procedure cannot be legally authorised after it has been performed. What constitutes proper authorisation under private law was discussed in detail in chapter four. The requirements for a proper authorisation, and the mechanisms in place to ensure that circumcisers do not proceed without a lawful authorisation, are integral to ensuring that surgical procedures, like circumcision, are only performed in ethical circumstances.

## **5.4 Duties in Performance**

Circumcisers have a legal obligation to perform circumcision with reasonable care and skill. This obligation exists as part of the law of negligence. This section discusses the standard of care a circumciser has under negligence law in the performance of the circumcision. The other requirements for a finding of negligence are discussed below (see discussion from page 105). The application of negligence law to the performance of a circumcision is a reasonably well settled area of law. Successful actions for negligently performed circumcisions have been brought in Australia and overseas.<sup>56</sup> A nineteen year old Australian man was, for example, awarded \$275,000 in 1987 for a circumcision that was negligently performed upon him as a child.<sup>57</sup> The most significant complexity in the application of this area of law to circumcision is in the determination of the standard of care that a circumciser must meet.

Circumcisers are not a uniform body in Australia. There is no standard qualification system for circumcisers. They can differ significantly in both the quality of training they have received, and the skill with which they can perform the procedure. Some have received no formal medical training. Some non-medically qualified circumcisers are skilled at a level equivalent to, or perhaps even superior to, medically qualified circumcisers. Some non-medically qualified circumcisers do not have a skill set significantly surpassing that of a layperson.

Most circumcisers in Australia would profess to have some skill at circumcising. The Australian common law standard of care for a person professing some special skill was established by the High Court in *Rogers v Whitaker*.<sup>58</sup> The majority of the High Court held that:<sup>59</sup>

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<sup>56</sup> See for example: *D.P. Jr v Haiba Sonyika, Cheryl Kendall, Tenet South Fulton Medical Center, We Care Pediatric and Adolescent Group Inc*, No. 2006ev001125 (GA Fulton County St Crt 2009).

<sup>57</sup> *St Margaret's Hospital for Women (Sydney) v McKibbin* (1987) Aust Torts Rep 59,009.

<sup>58</sup> *Rogers v Whitaker* (1992) 175 CLR 479.

In Australia, it has been accepted that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill. But, that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade.

No liability in negligence will attach to the conduct of a circumciser professing a skill at circumcising if they meet this common law standard of care.

The law does not appear to set a uniform standard of care for all circumcisers. This is because the standard of care required is linked to the level and type of skill the particular circumciser professes to have. Ritual circumcisers may, for example, be held to have a different, and presumably lower, standard of care from circumcisers with formal medical training. Alternative medical practitioners have previously been held to a different standard of care from that applicable to orthodox medical practitioners in England.<sup>60</sup> The distinction in these circumstances is made by the courts on the basis of 'the fact that the patient has chosen to reject the orthodox and prefer the alternative practitioner'.<sup>61</sup> The justification is that a person should not be owed the standards of a more highly or differently skilled practitioner if they have chosen to utilise a practitioner known to be less, or at least differently, skilled. The same argument may be accepted in the determination by a court of the required level of care and skill of a non-medical circumciser. Laypeople who do not profess to have any particular skill at circumcising, and who are known to the person authorising the circumcision to be a layperson, will probably not be held to a standard of care equivalent to that of a circumciser professing to have a level of skill above that of the layperson.<sup>62</sup>

However, it is also negligent in some circumstances for a person to undertake a task calling for special skills if they do not in fact possess those special skills.<sup>63</sup> Justice Deane, in a case dealing with the negligence of a layperson who altered a publicly installed phone line on their property, suggested that:<sup>64</sup>

A reasonably prudent occupier does not rely merely on his own judgment and skill in a situation where technical expertise which he does not possess is required. He should obtain and follow proper technical advice or employ a qualified person to perform repairs requiring expert skill. If he meddles himself, he cannot complain if the standards of care and foreseeability of injury which the law exacts of him are not those of the hypothetical person on a hypothetical Bondi tram or Clapham omnibus but those of the "ordinary skilled [person] exercising and professing to have that special skill".  
[References excluded]

It is not clear whether a similar argument could be raised in regard to a circumcision performed by a layperson. Circumcision may well be a procedure which requires the person performing it to have some technical expertise or knowledge, at least perhaps in some circumstances to avoid liability in negligence.

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<sup>59</sup> *Rogers v Whitaker* (1992) 175 CLR 479, 631 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).

<sup>60</sup> *Shakoor v Situ* [2000] 4 All ER 181.

<sup>61</sup> *Shakoor v Situ* [2000] 4 All ER 181, 188 (Livesey QC).

<sup>62</sup> *Blackmore v Beames* [1993] SASC 92-709 (Unreported, King CJ, Cox and Matheson JJ, 8 February 1993).

<sup>63</sup> *Wells v Cooper* [1958] 2 QB 691. See also: *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7.

<sup>64</sup> *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7, 36 (Deane J).

An exception to the common law standard of care exists in most Australian jurisdictions for health professionals, and, in several jurisdictions, for all professionals. A professional is not liable for negligence in New South Wales, Queensland, South Australia, Tasmania or Victoria if they act in a manner, at the time the service was provided, that was ‘widely accepted’ by peer professional opinion as competent professional practice.<sup>65</sup> Western Australia has a similarly worded exception for ‘medical’ professionals.<sup>66</sup> The exceptions in Queensland and Victoria do not offer protection to a professional unless ‘a significant number’ of respected practitioners in the professional’s particular field accept the practice in question as competent professional practice.<sup>67</sup>

A professional may not rely upon these exceptions if, in New South Wales, Queensland, South Australia or Tasmania, the court considers the professional opinion in question to be irrational.<sup>68</sup> The peer professional opinion exception cannot be relied upon in Victoria if the professional opinion is ‘unreasonable’.<sup>69</sup> The exception cannot be relied upon in Western Australia if the professional opinion relied upon is ‘so unreasonable that no reasonable health professional in the health professional’s position could have acted or omitted to do something in accordance with that practice.’<sup>70</sup>

Determining which circumcisers may be held to be ‘professionals’ is not a straightforward task. The civil liability Acts which define the term professional do so in a circular way. The Queensland statute provides for example: ‘a professional means a person practising a profession.’<sup>71</sup> The terms ‘profession’ and ‘professional’ are capable of both broad and narrow interpretation. There is no definitive approach to the interpretation of the term in Australia.<sup>72</sup> A circumciser with formal medical qualifications will almost certainly be regarded as a professional. A layperson who performs a circumcision will not be regarded as a professional. It is unclear whether a trained ritual circumciser, or any other circumciser trained outside of the medical profession, will be considered to be a professional for the purpose of the state and territory civil liability Acts.

The law also fails to provide significant guidance on how a circumciser’s ‘particular professional field’ ought to be determined. For example, the practice of *metzitzah b'peh* (sucking the blood from a circumcision wound with the mouth) utilised by some Orthodox Jewish *Mohels* may well be regarded as competent professional practice by some or many Orthodox or Ultra-Orthodox

<sup>65</sup> *Civil Liability Act 2002* (NSW) s 50(1); *Civil Liability Act 2003* (Qld) s 22(1); *Civil Liability Act 2002* (Tas) s 22(1); *Wrongs Act 1958* (Vic) s 59(1).

<sup>66</sup> *Civil Liability Act 2002* (WA) s 5PB(1).

<sup>67</sup> *Civil Liability Act 2003* (Qld) s 22(1); *Wrongs Act 1958* (Vic) s 59(1).

<sup>68</sup> *Civil Liability Act 2002* (Tas) s 22(2); *Civil Liability Act 2002* (NSW) s 50(2); *Civil Liability Act 2003* (Qld) s 22(2); *Civil Liability Act 1936* (SA) s 41 (2).

<sup>69</sup> *Wrongs Act 1958* (Vic) s 59 (2).

<sup>70</sup> *Civil Liability Act 2002* (WA) s 5PB(4).

<sup>71</sup> See: *Civil Liability Act 2003* (Qld) s 20.

<sup>72</sup> Courts were once reluctant to extend the kinds of work considered as professional beyond the fields of religion, defence, law, and medicine, see: *R v Chemical Institute of Canada* [1974] 1 FC 247, 251 (Urie J); *Robbins Herbal Institute v Federal Commissioner of Taxation* (1923) 32 CLR 457, 460 (Starke J). Courts now seem more willing to accept that the term profession ‘is not one which is rigid or static in its signification...’, see: *Bradfield v Federal Commissioner of Taxation* (1924) 34 CLR 1, 7 (Issacs J). In *Robbins Herbal Institute v Federal Commissioner of Taxation* the High Court suggested that: ‘profession’ implies attainment in special knowledge, as distinct from skill. It requires the attainment of knowledge acquired only after patient study and application”. See: *Robbins Herbal Institute v Federal Commissioner of Taxation* (1923) 32 CLR 457, 461 (Starke J). English courts have shown a willingness to give the term an even more inclusive meaning by including work as a profession if the ordinary man on the street considers the work to be professional: *Carr v Inland Revenue Commissioner* (1944) 2 All ER 163, 166 (du Parc LJ).

Jewish *Mohels*. However, it is unlikely to be similarly regarded by many Jewish *Mohels*, non-Jewish ritual circumcisers, or medical professionals. The acceptable standard of a circumciser as to some practices, such as the type of anaesthetic provided, may depend almost entirely upon how a court classes a circumciser's particular professional field.

Private law is integral to defining the level of skill and care a circumciser must have in the provision of their service. It provides a benchmark to ensure high standards in the provision of circumcision services throughout Australia. The following section discusses the standard a circumciser must meet in the provision of post operative care.

## 5.5 Duty to Inform of Problems and to Follow Up

Complications with circumcision sometimes become apparent after the procedure has been performed and the wound has been treated.<sup>73</sup> A medical professional may continue to have a duty under negligence law to a person after they have operated upon them, treated the wound, and discharged the person from their care. This section discusses the standard of care a circumciser has, under negligence law, to provide after they have performed the circumcision. The other requirements for a finding of negligence are discussed below (see discussion from page 105).

A post operative duty of care under negligence law has been established in the following circumstances: when a doctor ought to have known that a patient should have been provided with more information after a procedure;<sup>74</sup> in instances where a doctor knew, or ought to have known, that a review consultation was important for the health of their patient;<sup>75</sup> and, when a patient is discharged with instructions or advice that the patient must themselves follow for the patient's health to improve.<sup>76</sup> There may well be little content to the post operative duty when a circumcision is successfully performed. The scope of the post operative duty is a question to be determined by a court in the particular circumstances. A post operative duty is particularly likely to arise when:<sup>77</sup>

- a procedure was unsuccessful or a complication occurred;
- there is a long-standing relationship between doctor and patient;
- a patient is seriously ill and their health is in need of continuing medical attention; and
- a diagnosis is provisional or treatment is incomplete.

The law in this area is still developing. However, it seems that circumcisers ought to check on their patients following the procedure, perhaps even regularly until the wound has healed completely, and they ought to ensure that the person caring for the wound knows and understands all the information and advice, and the importance of this information and advice, relevant to providing the best care possible for the wound.

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<sup>73</sup> For a discussion of post-operative complications see: Rafael Pieretti, Allan Goldstein and Rafael Pieretti-Vanmarcke, 'Late Complications of Newborn Circumcision: A Common and Avoidable Problem' (2010) 26 *Pediatric Surgery International* 515.

<sup>74</sup> *Wighton v Arnot* [2005] NSWSC 637 (Unreported, Studdert J, 5 July 2005).

<sup>75</sup> *Brett v Kloss* [2006] VCC 193 (Unreported, Cohen J, 28 February 2006).

<sup>76</sup> *Kite v Malycha* [1998] SASR 321.

<sup>77</sup> Matthew Ellis, 'Patient Follow-up: The Scope of the Duty, the Impact of Tort Law Reform and Practical Suggestions to Comply with Legal Requirements' (2007) 15 *Journal of Law and Medicine* 408, 418.

## 5.6 Actions in Negligence

This section discusses the requirements for an action in negligence. To succeed in negligence (in the provision of information, in the performance of a circumcision, or in post operative care) it must be proved that: the circumciser breached their duty to the patient; the patient suffered an injury; and, that the circumciser caused the injury suffered. This is a settled area of law.

### Breach of duty

A person will not be liable in negligence unless they have breached the duty of care they owe to another. The standard of care owed by a circumciser in the provision of information, in the performance of a circumcision, and, in the provision of post operative care, was discussed above. The determination of a person's standard of care at common law involves 'a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have'.<sup>78</sup> Similar considerations are made relevant under the civil liability Acts.<sup>79</sup> In determining whether a reasonable person would have taken precautions against a risk, the civil liability Acts in each state and territory direct the courts to consider, amongst others things they deem relevant: the probability that the harm would occur if care were not taken; the likely seriousness of the harm; the burden of taking precautions to avoid the risk of harm; and the potential net benefit or social utility of the activity that exposes others to the risk of harm.<sup>80</sup> These considerations will determine the precise duty owed by a particular circumciser in the particular circumstances.

### Injury

To establish a claim of negligence the plaintiff must prove that they suffered an injury or loss. Loss or injury is at the heart of a negligence action. For a claim of a negligent failure to warn, the relevant injury is the causation of the harm the plaintiff was not informed about and ought to have been informed about. For a claim of negligence in the performance or post operative care of the circumcision the relevant injury will ordinarily be the pain, suffering, or any physical injury caused by the failure of the circumciser to perform at the standard required of them by law.

### Causation

The breach of the circumciser's duty to the plaintiff must have caused the plaintiff's injury for the circumciser to be liable for any injuries the plaintiff sustained. The civil liability Acts provide the factors relevant to determining causation. Causation of an injury is established by proving that breach of duty was a necessary element of the occurrence of the harm; and, following a

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<sup>78</sup> *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47 (Mason J).

<sup>79</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 43(1); *Civil Liability Act 2002* (NSW) s 5B(1); *Civil Liability Act 2003* (Qld) s 9(1); *Civil Liability Act 2002* (Tas) s 11(1); *Wrongs Act 1958* (Vic) s 48(1); *Civil Liability Act 2002* (WA) s 5B(1).

<sup>80</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 43(2); *Civil Liability Act 2002* (NSW) s 5B(2); *Civil Liability Act 2003* (Qld) s 9(2); *Civil Liability Act 2002* (Tas) s 11(2); *Wrongs Act 1958* (Vic) s 48(2); *Civil Liability Act 2002* (WA) s 5B(2).

consideration of normative issues, that it is ‘appropriate’ for the scope of the liability of the person in breach to extend to the harm.<sup>81</sup>

## Remedy

If the plaintiff can prove to the court, on the balance of probabilities, (assuming no defences apply) that a circumciser’s negligence caused injuries to them the court will order monetary compensation to be paid by the circumciser to the plaintiff. The purpose of the compensation is to put the injured plaintiff in the same position as if they had not sustained the injuries.<sup>82</sup> Damages are typically a one-off payment, requiring an assessment of past losses suffered as well as speculation about the plaintiff’s future losses. The relevant losses include non-economic losses, such as: pain, suffering, and loss of amenities (perhaps a loss in sexual function for example). The courts are unconcerned with how the money is used. The burden is on the plaintiff to establish the losses they are seeking damages for. The civil liability Acts in Australia sometimes limit the damages potentially available to a person under common law. For example, the amount of damages recoverable for non-economic loss is capped in most Australian jurisdictions.<sup>83</sup>

Punitive damages may be awarded in some circumstances to punish the defendant and deter others from engaging in similar conduct. At common law, punitive damages may only be awarded for ‘a conscious and contumelious disregard for the plaintiff’s rights’.<sup>84</sup> Aggravated damages may be awarded in some circumstances to compensate for the plaintiff’s hurt feelings caused by a defendant’s behaviour that goes beyond ‘ordinary wrongdoing, of a kind consistent with ordinary human fallibility’.<sup>85</sup> Legislation in several jurisdictions severely limits the freedom of courts to award punitive or aggravated damages for some actions.<sup>86</sup>

## 5.7 Limitation Periods

The limitation Acts in each state and territory limit the period of time in which a person may bring an action for some torts. Other Acts also place limits upon the time in which some other kinds of action may ordinarily be brought. An action will not usually be able to be brought outside of the relevant limitation period. This section discusses the current limitation periods affecting an action for misleading or deceptive conduct and in torts governing personal injury. This law is particularly relevant to actions brought by adults who were harmed by a circumcision as a child.

The *TPA* and the FTAs limit the period in which an action may be brought for misleading and deceptive conduct. The *TPA* limits the period in which most actions can be brought to 6 years after the day on which the cause of action that relates to the actionable conduct accrued.<sup>87</sup> The

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<sup>81</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 45; *Civil Liability Act 2002* (NSW) s 5D; *Civil Liability Act 2003* (Qld) s 11; *Civil Liability Act 2002* (Tas) s 13; *Wrongs Act 1958* (Vic) s 51; *Civil Liability Act 2002* (WA) s 5C. See also: *Ruddock v Taylor* (2003) 58 NSWLR 269, [85]-[88] (Ipp JA).

<sup>82</sup> *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, 191 (Taylor and Owen JJ); *Todorovic v Waller* (1981) 150 CLR 402.

<sup>83</sup> See: *Civil Liability Act 2002* (NSW) s 16; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 27; *Civil Liability Act 2003* (Qld) s 62; *Civil Liability Act 1936* (SA) s 52; *Civil Liability Act 2002* (Tas) s 27; *Wrongs Act 1958* (Vic) s 28G; *Civil Liability Act 2002* (WA) ss 9, 10.

<sup>84</sup> *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 154 (Windeyer J).

<sup>85</sup> *New South Wales v Riley* (2003) 57 NSWLR 496, 528 (Hodgson JA).

<sup>86</sup> *Civil Liability Act 2002* (NSW) s 21; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 19; *Civil Liability Act 2003* (Qld) s 52.

<sup>87</sup> *Trade Practices Act 1974* (Cth) s 81(2); *Trade Practices Act 1974* (Cth) s 87(1CA).



FTAs in the Northern Territory, Queensland, South Australia and Western Australia establish a three year limitation period.<sup>88</sup> The FTAs in New South Wales, Victoria and the Australian Capital Territory establish a six year limitation period.<sup>89</sup>

Legislation in each state and territory limits the period in which a person may bring an action for personal injuries to three years.<sup>90</sup> In the Australian Capital Territory, Queensland, the Northern Territory, and South Australia, the time runs from the date of the action accruing.<sup>91</sup> The limitation Acts in the Australian Capital Territory, New South Wales, Tasmania, Victoria, and Western Australia allow the time to run from the date of discoverability.<sup>92</sup> However, legislation in New South Wales, Tasmania, and Victoria prohibits an action from being brought more than twelve years from the incident giving rise to the cause of action.<sup>93</sup>

The majority of jurisdictions have legislation which allows for a discretionary extension of the period of limitation for actions alleging personal injury.<sup>94</sup> The circumstances in which an extension may be granted differ between jurisdictions. The High Court has made it clear that any extension of a statutory fixed period should be exercised sparingly.<sup>95</sup> An extension must be just and reasonable to be granted in the Australian Capital Territory, Tasmania, and Victoria.<sup>96</sup> An extension not exceeding three years from the date of discoverability, regardless of any other limitation, may be granted in New South Wales if it would be just and reasonable to do so.<sup>97</sup> An extension may be granted in the Northern Territory and South Australia if it would be just to do so.<sup>98</sup> The limitation period may be extended in Western Australia for personal injuries for three years if the plaintiff was not aware of the physical cause of the death or injury; was aware of the physical cause of the death or injury but was not aware that the death or injury was attributable to the conduct of a person; or was aware of the physical cause of the death or injury and that the death or injury was attributable to the conduct of a person but after reasonable enquiry, had been unable to establish that person's identity.<sup>99</sup> The limitation period in Queensland may be extended if '...a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action'.<sup>100</sup> A list of material facts is included in Queensland's *Limitation of Actions Act 1974*.<sup>101</sup> A person, in these circumstances, may be granted

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<sup>88</sup> *Consumer Affairs and Fair Trading Act 2008* (NT) s 91(2); *Fair Trading Act 1989* (QLD) s 99(3); *Fair Trading Act 1987* (SA) s 84(2); *Fair Trading Act 1987* (WA) s 79(2).

<sup>89</sup> *Fair Trading Act 1987* (NSW) ss 68(2), 72(6); *Fair Trading Act 1999* (Vic) s 159(3).

<sup>90</sup> *Limitation Act 1985* (ACT) s 16B(2); *Limitation Act 1969* (NSW) ss 18A(2), 50C; *Limitation of Actions Act 1974* (Qld) s 11; *Limitation of Actions Act 1936* (SA) s 36; *Limitation Act 1974* (Tas) s 5(1); *Limitation of Actions Act 1958* (Vic) ss 5(1AA), 27D(1)(a); *Limitation Act 1981* (NT) s 12(1)(b); *Limitation Act 2005* (WA) s 13(1).

<sup>91</sup> *Limitation Act 1985* (ACT) s 16B(2); *Limitation of Actions Act 1974* (Qld) s 11; *Limitation Act 1981* (NT) s 12(1)(b); *Limitation of Actions Act 1936* (SA) s 36(1).

<sup>92</sup> *Limitation Act 1985* (ACT) s 16B; *Limitation Act 1969* (NSW) ss 50A, 50C, 50D; *Limitation Act 1974* (Tas) s 5A; *Limitation of Actions Act 1958* (Vic) ss 27D, 27F; *Limitation Act 2005* (WA) ss 6, 55.

<sup>93</sup> *Limitation Act 1969* (NSW) s 50C(1)(b); *Limitation Act 1974* (Tas) s 5A(3)(b); *Limitation of Actions Act 1958* (Vic) ss 27B(1)(b), 27(d).

<sup>94</sup> *Limitation of Actions Act 1958* (Vic) s 23A, pt IIA div 3; *Limitation Act 1974* (Tas) ss 5A(5), 26; *Limitation Act 1969* (NSW) pt 3 div 4; *Limitation Act 1981* (NT) s 44; *Limitation Act 1985* (ACT) s 36(4); *Limitation Act 2005* (WA) pt 3 div 3; *Limitation of Actions Act 1936* (SA) s 48; *Limitation of Actions Act 1974* (Qld) pt 3.

<sup>95</sup> See: *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541.

<sup>96</sup> *Limitation Act 1985* (ACT) s 36; *Limitation Act 1974* (Tas) s 5(3); *Limitation of Actions Act 1958* (Vic) s 27(K).

<sup>97</sup> *Limitation Act 1969* (NSW) s 62A(2).

<sup>98</sup> *Limitation Act 1981* (NT) s 44; *Limitation of Actions Act 1936* (SA) s 48.

<sup>99</sup> *Limitation Act 2005* (WA) s 39(3).

<sup>100</sup> *Limitation of Actions Act 1974* (Qld) s 31(2).

<sup>101</sup> *Limitation of Actions Act 1974* (Qld) s 31(2).

an extension of a year from the time they gained knowledge of this material fact of a decisive character.<sup>102</sup>

Australian law is not uniform on whether the limitation period for an action is suspended during a person's minority. For example, the limitation period for a personal injury to a child is not suspended in New South Wales, Tasmania, Victoria, and, Western Australia, whilst the child is in the custody of its parents, unless the potential defendant is a parent of the child, or a close associate of (in New South Wales or Victoria), or in a close relationship with (in Tasmania and Western Australia), the parents of the child.<sup>103</sup> The terms 'close associate' and 'close relationship' are defined similarly, but not identically, in each of the limitation Acts in these jurisdictions.<sup>104</sup> The definitions essentially hold that a person is in a close relationship with, or is a close associate of, a minor's parent or guardian when: the parent or guardian might be influenced by the person not to bring a claim on behalf of the minor against the person; or, the minor might be unwilling to disclose to the parent or guardian the conduct or events in respect of which the cause of action is founded.

The limitation Acts in the Australian Capital Territory, the Northern Territory, Queensland, and, South Australia, suspend the limitation period for actions to be brought by a child, or on their behalf, until the child reaches 18.<sup>105</sup> In Queensland a parent or guardian must give notice to the defendant within six years of when they ought to have known the personal injury accrued to their child or within 18 months of when they sought legal advice.<sup>106</sup> Similar provisions exist in the Australian Capital Territory and South Australia.<sup>107</sup> The law in New South Wales, Tasmania, Victoria, and Western Australia does not suspend the limitation period during a person's minority. This law may operate, depending on the particular facts, to limit when an adult harmed as an incapable minor may bring an action for a circumcision.

## 5.8 The Defence of Illegality

Australian law does not always provide a remedy to a person who is harmed whilst engaging in an illegal enterprise or activity. As discussed previously (see discussion from page 70), a person undergoing an illegal circumcision may themselves, in some circumstances (where they aid, assist, abet or instigate an illegal circumcision), be criminally liable as an accessory to the illegal circumcision. This section briefly discusses the operation of the illegality defence in Australia. The illegality defence will not operate to prohibit children too young to be criminally liable from receiving the full damages owed to them under private law.<sup>108</sup>

The presence of the illegality defence is neither clear nor uniform in its application in Australia. The High Court last considered the defence in *Gala v Preston* in the context of harm caused during an illegal joint enterprise.<sup>109</sup> The reasoning of the majority in this decision is not entirely clear. However, it seems to stand for the proposition that the duty of care between a defendant

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<sup>102</sup> *Limitation of Actions Act 1974* (Qld) s 30(1)(a).

<sup>103</sup> *Limitation Act 1969* (NSW) ss 50E, 50F; *Limitation of Actions Act 1958* (Vic) ss 27I, 27J(1); *Limitation Act 1974* (Tas) ss 26, 27; *Limitation Act 2005* (WA) ss 30-33.

<sup>104</sup> *Limitation Act 1969* (NSW) s 50E(2); *Limitation of Actions Act 1958* (Vic) s 27I(2); *Limitation Act 1974* (Tas) s 26(8); *Limitation Act 2005* (WA) s 33.

<sup>105</sup> *Limitation Act 1985* (ACT) s 30; *Limitation of Actions Act 1974* (Qld) s 5(2); *Limitation of Actions Act 1936* (SA) s 45; *Limitation Act 1974* (Tas) s 26(1); *Limitation Act 1981* (NT) s 36.

<sup>106</sup> *Personal Injuries Proceedings Act 2002* (Qld) s 20C.

<sup>107</sup> *Limitation Act 1985* (ACT) ss 30A-30B; *Limitation of Actions Act 1936* (SA) s 45A.

<sup>108</sup> For the ages at which a minor may be criminally liable, see discussion from page 72.

<sup>109</sup> *Gala v Preston* (1991) 172 CLR 243.

and a plaintiff will be negated if, in the circumstances of the harm caused during a criminal activity, it would be 'impossible or not feasible' for the court to determine an appropriate standard of care between the plaintiff and the defendant in the circumstances.<sup>110</sup> The court noted that, in the circumstances of two intoxicated joy riders, 'the participants could not have had any reasonable basis for expecting that a driver of the vehicle would drive it according to ordinary standards of competence and care'.<sup>111</sup>

It is quite unlikely that, in the circumstances of a typical, but potentially negligently performed circumcision, a court will consider itself unable or unwilling to delineate a standard of care for a circumciser. The determination of a standard of care in the context of a circumcision will not, except perhaps in the most extraordinary of circumstances, pose insurmountable problems of morality or factual complexity to a court.

The common law approach is affected by the civil liability legislation in most states and territories except Western Australia. The change is relatively minor in Victoria, where the legislation only makes the plaintiff's participation in illegal activity a relevant consideration in 'determining whether the plaintiff has established a breach of the duty of care owed by the defendant'.<sup>112</sup> The common law is also left unaltered in South Australia by virtue of a specific saving provision.<sup>113</sup>

Although there are minor differences between the jurisdictions, the law in New South Wales, Queensland, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory is similar. In those jurisdictions a person may not recover compensation for their injuries (damage or death in New South Wales and Tasmania; and for civil liability in Queensland) when it is sustained during an offence that is 'serious' (Tasmania and New South Wales: an offence is serious if it is punishable with greater than six months imprisonment);<sup>114</sup> 'indictable' (Australian Capital Territory, South Australia and Queensland);<sup>115</sup> or, 'punishable by imprisonment' (Northern Territory).<sup>116</sup> The injured person's conduct must have contributed 'materially' to the risk of injury in these jurisdictions.<sup>117</sup> The offence, except in South Australia, only needs to be established on the balance of probabilities for the purpose of the illegality sections.<sup>118</sup> Damages may be awarded in South Australia, the Northern Territory, and in the Australian Capital Territory, even if the plaintiff was engaged in criminal conduct, if the circumstances of the case are exceptional and the non-award of damages would operate harshly and unjustly.<sup>119</sup>

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<sup>110</sup> *Gala v Preston* (1991) 172 CLR 243, 252-253 (Mason CJ, Deane, Gaudron McHugh JJ).

<sup>111</sup> *Gala v Preston* (1991) 172 CLR 243, 524 (Mason CJ, Deane, Gaudron and McHugh JJ). However, the majority decision in *Gala v Preston* has been criticised, see for example: Rick Glofcheski, 'Plaintiff's Illegality as a Bar to Recovery of Personal Injury Damage' (2006) 19 *Legal Studies* 6, 13.

<sup>112</sup> *Wrongs Act 1958* (Vic) s 14G(2).

<sup>113</sup> *Civil Liability Act 1936* (SA) s 43(4)(c).

<sup>114</sup> *Civil Liability Act 2002* (NSW) ss 54(1)(a), 54(1)(3); *Civil Liability Act 2002* (Tas) ss 6(1)(a); 6(3).

<sup>115</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 94(1)(a); *Civil Liability Act 2003* (Qld) s 45(1); *Civil Liability Act 1936* (SA) s 43(1)(a).

<sup>116</sup> *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 10(1)(a).

<sup>117</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 94(1)(b); *Civil Liability Act 2003* (Qld) s 45(1); *Civil Liability Act 1936* (SA) s 43(1)(b); *Civil Liability Act 2002* (NSW) s 54(1)(b); *Civil Liability Act 2002* (Tas) s 6(1)(b).

<sup>118</sup> The South Australian provision requires it be satisfied beyond a reasonable doubt: *Civil Liability Act 1936* (SA) s 43(1)(a). In New South Wales and Queensland the legislation expressly states that the provision will operate whether a person is convicted in a criminal court for the offence or not: *Civil Liability Act 2003* (Qld) s 45(4); *Civil Liability Act 2002* (NSW) s 54(5).

<sup>119</sup> Queensland reduces the damages a person is entitled to if they are awarded damages in these circumstances: *Civil Liability Act 2003* (Qld) s 45(3).

The legislative provisions could operate to exclude liability in negligence for an illegally performed circumcision on an adult. However, a court will probably be unlikely to find, as required under the various Acts, that the conduct of a young child contributed materially to any injury they sustained from being circumcised. The common law approach, and, the exceptions in some jurisdictions for harsh or unjust applications of the law, might allow many claimants, at least when their illegal circumcision was not of an extraordinary kind, to be successful in private law actions. However, the lack of an express exception in Tasmania, Queensland, and New South Wales, for unjust applications of the law, may mean that adult plaintiffs may not be able to succeed in a claim in negligence should their participation in a circumcision be capable of being deemed unlawful.

## 5.9 The Use and Sale of Excised Foreskin as Property

There is a market for excised foreskin. The potentially profitable uses of excised foreskin were discussed previously (see discussion from page 18). However, the legal status of excised foreskin as property that can be bought, sold and used for profit is uncertain. There is, in particular, considerable uncertainty in the common law as to whether excised tissue can be a person's property. This section discusses who may have the legal right to benefit from the use or sale of an excised foreskin as an item of property.

It seems that excised human tissue can, at least in some circumstances, be property, although not necessarily the property of the person from which the tissue originated. The High Court of Australia in *Doodeward v Spence*,<sup>120</sup> a decision now over 100 years old, held that human tissue can be regarded as property once work or skill, such as efforts to preserve the tissue, is employed by a person upon the tissue.<sup>121</sup> The common law has not developed significantly since *Doodeward v Spence*. An Australian state Supreme Court decision and an overseas appellate court decision confirm that human tissue is capable of being regarded as property in some, albeit poorly defined, circumstances.<sup>122</sup> These decisions also confirm that the determination of whether human tissue is property is a task which is being undertaken by the courts in light of the particular times, and, 'with reason and good sense'.<sup>123</sup> The decisions, particularly as they do not address circumcision specifically, do not, however, provide authoritative guidance on whether, or when, an excised foreskin is likely to be considered property, or on the attribution of rights which may attach to a foreskin if it can be regarded as property under common law.

The use and sale of excised human tissue is also regulated by legislation in each Australian State and Territory. This legislation does not provide a comprehensive or uniform regulatory regime for human tissue. The statutes leave many questions regarding the use or sale of excised human tissue unanswered. The relevant legislation was passed, at least primarily, to address matters pertinent to the donation and transplantation of human tissue from the body of one person to the body of another. However, each statute has one or more sections regulating the use or sale of excised human tissue for a reason other than transplantation or donation. The legislation prohibits a

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<sup>120</sup> *Doodeward v Spence* (1908) 6 CLR 406.

<sup>121</sup> *Doodeward v Spence* (1908) 6 CLR 406. For a discussion on the complex issue of property in the human body see: Richard Taylor, *Human Property: Threat or Saviour?* (2002) *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v9n4/taylor94.html>> at 20 October 2010.

<sup>122</sup> *Roche v Douglas as Administrator of the Estate of Edward John Hamilton Rowan (Dec)* [2000] WASC 146 (Unreported, Master Sanderson, 7 June 2000); *R v Kelly and Lindsay* [1998] EWCA Crim 1578 (Unreported, Rose LJ, Ognall and Sullivan JJ, 14th May, 1998).

<sup>123</sup> *Roche v Douglas as Administrator of the Estate of Edward John Hamilton Rowan (Dec)* [2000] WASC 146 (Unreported, Master Sanderson, 7 June 2000) [23]. See also: *R v Kelly and Lindsay* [1998] EWCA Crim 1578 (Unreported, Rose LJ, Ognall and Sullivan JJ, 14th May, 1998) [42] (Rose LJ).

person from entering into an arrangement to sell or supply human tissue for valuable consideration.<sup>124</sup> However, each jurisdiction allows one or more exceptions to this general prohibition. The prohibition does not apply in most jurisdictions, excepting Western Australia, Queensland and Victoria, to human tissue which has been the subject of processing or treatment, and, which is made for use in accordance with the directions of a medical practitioner for therapeutic or scientific purposes.<sup>125</sup> At least one practitioner in Australia forwards the foreskins he excises to a non-profit research organisation.<sup>126</sup> Several jurisdictions also allow a designated government official to grant an exception to the general prohibition in some circumstances.<sup>127</sup>

The prohibitions on the sale and supply of foreskin do not apply to human tissue which is removed in the course of medical or surgical treatment carried out by a medical practitioner in the interests of the health of the person it is removed from (or for the benefit of the person it is removed from in Queensland), so long as consent to the removal of the tissue is provided by the person, or on behalf of the person, the tissue is removed from.<sup>128</sup> Consequently, the use (and seemingly the sale or supply) of a foreskin excised during a properly authorised circumcision performed by a medical practitioner will not be prohibited by the relevant human tissue statutes if the procedure can be characterised as ‘medical or surgical treatment’ which is in the interests of the patient’s health. ‘Health’ is not defined by the human tissue Acts. The considerations potentially relevant to finding whether a circumcision is in the ‘interests of health’ were discussed in chapter three (see discussion from page 42). Whether circumcision is capable of being regarded as medical or surgical treatment in law was also discussed in detail in chapter three (see discussion from page 62).

## 5.10 Critical Analysis

There is nothing particular about circumcision, compared to any other practice, which requires it to be governed by a completely separate private law regime. However, reform may be required in some areas of the law to clarify, particularise, or improve its application to circumcision. Several matters combine to make circumcision a special procedure which may warrant such particularisation in some circumstances. They include:

- the certain physical harm involved;
- the known risk of and potential for harm exceeding the normal consequences of the procedure;
- the non-therapeutic, but possibly prophylactic nature of the procedure;

<sup>124</sup> *Human Tissue Act 1985* (Tas) s 27(1); *Human Tissue Transplant Act 1979* (NT) s 24; *Transplantation and Anatomy Act 1983* (SA) s 35; *Human Tissue and Transplantation Act 1982* (WA) s 29; *Human Tissue Act 1983* (NSW) s 32. Legislation in Queensland and Victoria also generally prohibits the buying or selling of human tissue, see: *Transplantation and Anatomy Act 1979* (Qld) ss 40, 42; *Human Tissue Act 1982* (Vic) ss 38-39.

<sup>125</sup> *Human Tissue Act 1985* (Tas) s 27(2); *Human Tissue Transplant Act 1979* (NT) s 24(4); *Transplantation and Anatomy Act 1983* (SA) s 35(3); *Human Tissue Act 1983* (NSW) s 32(2). The legislation in South Australia and New South Wales also recognises the validity of medical purposes. The use does not have to be directed by a medical practitioner in New South Wales.

<sup>126</sup> Terry Russell, *Cancer Research* (2009) Russell Medical Centre <[http://www.russellmedical.com.au/Circumcision/Cancer\\_Research.aspx](http://www.russellmedical.com.au/Circumcision/Cancer_Research.aspx)> at 20 October 2010.

<sup>127</sup> *Human Tissue Act 1985* (Tas) s 27(4); *Human Tissue Transplant Act 1979* (NT) s 24(3); *Transplantation and Anatomy Act 1983* (SA) s 35(6); *Human Tissue Act 1983* (NSW) s 32(4).

<sup>128</sup> *Human Tissue Act 1985* (Tas) s 28; *Human Tissue Transplant Act 1979* (NT) s 26; *Transplantation and Anatomy Act 1983* (SA) s 37; *Human Tissue and Transplantation Act 1982* (WA) s 32; *Human Tissue Act 1983* (NSW) s 34; *Transplantation and Anatomy Act 1979* (Qld) s 47; *Human Tissue Act 1982* (Vic) s 42.

- the misconceptions, disputes, and uncertainties surrounding the procedure's impact on health and comfort;
- the existence of social, religious, and cultural benefits thought by some to outweigh the harm of the procedure;
- the significant lack of uniformity in the training, technique, and skill of people who perform circumcisions in Australia;
- the fact that most circumcisions in Australia are performed upon people too young to authorise the procedure themselves;
- the likelihood of uneven power relationships between a circumciser and their patient and/or the people who authorise the circumcision; and,
- the ability to commercialise and profit from the procedure and the supply of excised foreskin.

This section considers some matters as to the form of the current private law regime which proponents of the key conceptual influences in the circumcision debate may wish to see reformed.

### **The Form of the Law**

The private law which currently regulates the provision of a circumciser's service is unnecessarily inaccessible and opaque. The most significant problem with the form of the law is that it is not easily accessible to laypeople or circumcisers alike. The law is general and does not make particular reference to circumcision. The current private law regime, involving a matrix of different laws, is too complex to be easily accessed or understood. This compounds the difficulties suffered by a layperson seeking redress through the law for a potentially wrongful circumcision. It also makes it difficult for circumcisers to regulate their practice according to law. The difficulty in accessing the law may be furthering the custom, once prevalent in many societies with a circumcising tradition, of treating circumcision as existing outside the law.

The current regime also fails to set clear standards of practice for circumcisers in many significant areas. This failure is a result of the inaccessibility of the law, and the uncertainty in the application of several areas of law to circumcision. It is not entirely clear, for example, when, or perhaps even whether, a circumciser may sell or use excised foreskin tissue for profit. There are also issues of uncertainty with regard to the exact differences in the standard of care, e.g. such as in the provision of information as to risks and the method and skill to be utilised, which may be expected from circumcisers with different backgrounds, training, and accreditation.

There are also differences in the law between jurisdictions. Some areas of law, such as the limitation period for actions brought for harm inflicted on a child, differ. These discrepancies between jurisdictions may operate unfairly and create confusion.

### **Conceptual Analysis**

Private law establishes several health and safety standards a circumciser has a duty to comply with in the performance of their service. The law seems to establish different standards for different circumcisers in some areas of their service. The precise content of the standards are set by the court according to the background, training, accreditation, or the level of skill, the circumciser professes to have (see discussion from page 99). Some circumcisers may for example, when operating in accordance with the standard of skill set by reference to the reasonable person in negligence law, be able to lawfully conduct themselves at a standard less stringent than that which might ideally, or even reasonably, be expected of all circumcisers

operating in Australia. Proponents of improved health and safety standards may seek reform to establish clearer and more uniform skill and care duties for all circumcisers in the provision of their service.

Religious and ethnic circumcisers may be concerned with the way private law determines a circumciser's standards. The law does not clearly demarcate the difference, if there is any, in the standard of care owed by a medically trained circumciser, compared to the duty owed by a non-medically trained circumciser. Some religious or traditional ethnic circumcisers may, for religious or ceremonial reasons, utilise surgically unnecessary and potentially dangerous practices, such as *metzitzah b'peh*, or use less effectual tools, which may be held to fall short of the standard of care required of most circumcisers under private law. Proponents of these kinds of circumcision may oppose, for example, the use of reasonable care as the standard against which the lawfulness of their practices is measured, at least when reasonableness is being judged by reference to practices outside of the circumciser's belief system. Proponents of religious and ethnicity associated circumcision may wish, in particular, to establish particularised standards for ritual circumcisers which allow for the lawfulness of important aspects of their particular circumcision practices.

Autonomy, as a conceptual influence, is particularly relevant to the duties and obligations owed by a circumciser to others under private law. Several areas of law discussed in this chapter concern issues of autonomy, particularly autonomy in decision making, including: the duty of a circumciser not to mislead or deceive; the duty of a circumciser to provide information; and, the ability of a person to direct or refuse the use or sale of their excised foreskin for profit. Autonomy is already a well established conceptual influence in medicine, and has become, in recent times, an important guiding principle of law, particularly in relation to medical law, and the law governing the authorisation of harm.

People concerned with promoting autonomy will want to alter the law to better protect people from injustices resulting from imbalances of both power and knowledge that may affect their decision making. They will particularly wish for reform to further empower decision making for circumcision performed outside a medical setting. Proponents may try, for example, to establish more stringent, enforceable, or clearly established requirements under law in regard to the information a traditional religious or ethnicity associated circumciser must provide. They may also wish to improve the means through which the information is provided to the decision maker to better aid their understanding and processing of the information provided. They will also favour reform which acts to improve the knowledge of circumcisers themselves as well as the people to be circumcised.

Proponents of autonomy will seek to reform the law to better protect against imbalances of power improperly affecting a person's decision making. They may be concerned about the potential of people, particularly children, to be harmed for no good reason or exploited. Some proponents may seek to further extend limitation periods, and improve record keeping, to ensure actions brought by individuals to protect their autonomy have the best chance of success. They may also, for example, argue for changes to allow for greater control of excised foreskin by the person from whom the foreskin is removed. The operation of the law on causation in negligence law highlights the unusual nature, and its incongruence with some notions of autonomy, of parental consent as an effective substitute for a person's own consent in private law. Les Haberfield was the first to identify this area of law as having an unusual application in the circumstances of

circumcisions performed upon incapable minors. Haberfield, commenting on the necessary requirement of causation in a negligence action, suggests that:<sup>129</sup>

Very orthodox and religious Jews or Muslims may find it more difficult than other parents to succeed at a negligence action where they are not advised of all the material risks in a circumcision procedure. This is not to suggest that they are not owed the same duty of care; the problem here is one of causation. The more compliant a parent is to religious doctrine, the more likely a parent is to consent to the circumcision regardless of risk. In that scenario, the failure to provide appropriate information cannot be said to be the cause of a child's injury should something go wrong.

Some people authorising circumcisions, for themselves, or for their child, may well give very little weight to some risks, even quite significant risks, in their decision making. They may be determined to have a circumcision performed regardless of the risks. Haberfield's argument, quite correctly, notes that a risk may be a material risk, and thus a risk a circumciser ought to provide information on (see discussion from page 98), and yet, the failure to warn of this risk, even if the risk eventuates, may not, in some circumstances, be regarded as the cause of the risk eventuating, which is a requirement for liability in negligence (see discussion from page 105). This is because it could not be said, in the circumstances Haberfield identifies, and in similar circumstances of parents highly motivated to circumcise their children, that the failure to warn was a necessary element of the occurrence of the harm. The child would not, by virtue of their parent's eagerness, succeed in a claim for a negligent failure to warn in such circumstances.<sup>130</sup> This is because the court is open to hold that the parents in these circumstances would have authorised the procedure even after being informed of the risk. Case law has previously identified religious conviction and social influences as relevant to the consideration of causation in negligent failure to warn cases as factors which may move people away from '...doing what a reasonable person in [their] situation might be expected to have done.'<sup>131</sup> Some proponents of autonomy may wish to further limit the circumstances in which a parent may authorise the circumcision of their incapable child to better protect children from the consequences of parental decision making which may be, at least arguably, unreasonably risky or unethical. Proponents of the minimalist approach to autonomy, or of naturalism, will wish to see the prohibition of circumcisions performed on minors.

## 5.11 Concluding Remarks

This chapter concludes the discussion of the law regulating circumcision practices in Australia. It analysed the application of several different aspects of private law to a circumciser's service to illustrate the importance of private law in the regulation of male circumcision. The analysis undertaken suggests that the current law is too inaccessible, opaque, and, in places, uncertain, to effectively regulate the interaction between circumcisers, particularly lay circumcisers, and others. It suggests that there are several areas of law which may benefit from reform to clarify or particularise existing private law in its application to circumcision. There are also several areas of law which may benefit from reform to better reflect the wishes of the proponents of the main conceptual influences in the circumcision debate.

The following chapter considers the human rights obligations which may affect the interpretation or application of the substantive law regulating circumcision in Australia.

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<sup>129</sup> Les Haberfield, above n 53.

<sup>130</sup> The child may be able to succeed in a different action for a remedy, such as battery, if the circumcision that was performed on them was not in their best interests.

<sup>131</sup> See for example: *Smith v Barking, Havering and Brentwood Health Authority* (1994) 5 Med LR 285, 289 (Hutchison J).



## Chapter 6

# Human Rights

Australia is a party to over nine hundred treaties and international conventions.<sup>1</sup> Some of these instruments create binding human rights obligations that affect the regulatory framework for circumcision in Australia. Domestic law, both state and federal, also establishes several human rights obligations relevant to the practice and legal regulation of circumcision. However, very few pronouncements on the application of human rights law to circumcision have been made by authoritative international human rights law bodies,<sup>2</sup> and the matter has never been considered in detail by an Australian court, or a state or federal human rights organisation.<sup>3</sup>

This chapter discusses Australia's human rights obligations created by specialised human rights instruments. The first half of the chapter explains the enforceability and legal effect of the obligations, and discusses the conventions which govern the interpretation of the relevant human rights instruments. The second half of the chapter outlines and critically analyses the human rights obligations relevant to circumcision in Australia.

The discussion will show that an individual who has had their human rights breached generally has few remedies available for such a breach. There are mechanisms for enforcing the rights in the human rights instruments in the Australian Capital Territory and Victoria against public authorities. Complaints can be made to international tribunals under some international conventions. Some rights, with limited remedies attached, are also available under the *Commonwealth Constitution*.<sup>4</sup> However, international and domestic human rights instruments do not generally provide individuals with recourse to traditional remedies, such as compensation, when their rights are breached.<sup>5</sup> The analysis suggests that human rights will have symbolic importance as a rallying point for reform and critique in the circumcision debate and for law reform. However, it also suggests that the law is unlikely to have a determining effect on the legal regulation of circumcision. This is because human rights jurisprudence does not provide a clear direction forward.

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<sup>1</sup> Justice McHugh estimated that Australia was a party to approximately 900 treaties and conventions in 1995, see: *Minister for Immigration v Teoh* (1995) 183 CLR 273, 316.

<sup>2</sup> However, international law experts have universally condemned circumcision of an adult against their wishes. See for example: *Final Report of the Commission of Experts [on the Former Yugoslavia]*, SC Res 780, pt IV(F), Doc S/1994/674 (1994). The World Health Organisation has also suggested that 'a human rights-based approach to introducing or expanding male circumcision services requires measures to ensure that the procedure can be carried out safely, under conditions of informed consent, and without discrimination': UNAIDS, *Safe, Voluntary, Informed Male Circumcision and Comprehensive HIV Prevention Programming: Guidance for Decision-makers on Human Rights, Ethical and Legal Considerations* (2008) 8.

<sup>3</sup> The Human Rights and Equal Opportunity Commission (now the HRC) suggested more than a decade ago in passing that the right to freedom of religion would protect parents who circumcise their children for religious reasons. See: Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998) 59.

<sup>4</sup> See for example: *Commonwealth Constitution* ss 51 (xxxi), 80, 92, 116, 117. The High Court has also seen fit to imply rights into the *Commonwealth Constitution*, see for example: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>5</sup> However, it should be noted that some domestic Acts embodying human rights principles, such as the anti-discrimination Acts, do provide some remedies to be obtained for contravention of the Acts. The Australian Capital Territory *Human Rights Act* has also been held to provide compensation for breaches of some rights, see: *Human Rights Act 2004 (ACT)* s 18(7). See also: *Morro & Ahadizad v Australian Capital Territory* [2009] ACTSC 118 (Unreported, Gray J, 10 September 2009).

## 6.1 Effect of Australia's Human Rights Obligations

### International Law

International law does not operate as a direct source of rights and obligations in Australia until implemented in domestic legislation.<sup>6</sup> Australia is obligated under international law to implement the treaties that it has ratified, and Australians are entitled to the rights within ratified treaties.<sup>7</sup> However, Australia has not fully implemented all of the international law conventions it has ratified. Domestic law is not invalid for inconsistency with an international law obligation, and there is no legal mechanism in international law to bring Australian law into compliance with international law.<sup>8</sup>

Australia has ratified the *International Covenant on Civil and Political Rights (ICCPR)* and its first Optional Protocol.<sup>9</sup> The protocol creates a mechanism through which individuals can lodge a public complaint with the United Nations Human Rights Committee.<sup>10</sup> Complaints have been brought to the Committee by Australians in the past.<sup>11</sup> Complaints can only be lodged with the Committee once the person lodging a complaint has exhausted all available domestic remedies.<sup>12</sup> A finding of the Human Rights Committee, although a source of political pressure for change, is not legally binding or enforceable in Australia, or on any Australian lawmaking body.

The Commonwealth Parliament has passed the *Australian Human Rights Commission Act 1986*.<sup>13</sup> This Act establishes the Human Rights Commission (HRC). The Act provides the HRC with the responsibility of monitoring many of the international human rights instruments ratified by Australia, including, relevantly: the ICCPR, the *Convention on the Rights of the Child (CRC)*,<sup>14</sup> the *Declaration of the Rights of the Child*,<sup>15</sup> and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*.<sup>16</sup> The HRC reviews and monitors legislation, conducts inquiries, investigates and conciliates complaints of breaches of human rights (made against the Commonwealth or one of its agencies), provides policy advice, and delivers human rights education in accordance with the relevant treaties. The HRC does not have the power to enforce a remedy against a party for a breach of a human right. The HRC cannot invalidate legislation which is incompatible with international human rights law. Where conciliation is insufficient, the HRC can prepare a report in relation to the matter with recommendations for reform and present it to the Attorney General for tabling before the Commonwealth Parliament.

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<sup>6</sup> *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270, 274 (Mason CJ).

<sup>7</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 26 (entered into force 27 January 1980).

<sup>8</sup> *Horta v Commonwealth* (1994) 181 CLR 183.

<sup>9</sup> [First] *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976).

<sup>10</sup> [First] *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302, art 1 (entered into force 23 March 1976).

<sup>11</sup> See for example: *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

<sup>12</sup> [First] *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302, art 2 (entered into force 23 March 1976).

<sup>13</sup> *Australian Human Rights Commission Act 1986* (Cth).

<sup>14</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3 (entered into force 2 September 1990).

<sup>15</sup> *Declaration of the Rights of the Child*, GA Res 1386(XIV), UN GAOR 14, Supp No 16, UN Doc A/4354 (1959).

<sup>16</sup> *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR 26, Supp No 51, UN Doc A/36/684 (1981).

Ratified international treaties also have several subsidiary effects and uses in Australia. For example, ratified treaties may potentially be used domestically as:

- an aid to statutory interpretation;<sup>17</sup>
- an influence on the development of the common law;<sup>18</sup>
- a basis for judicial review of administrative decisions;<sup>19</sup>
- an aid to the exercise of judicial discretion;<sup>20</sup> and
- a guide for law review and reform proposals.<sup>21</sup>

The human rights obligations created by international law are discussed and analysed in detail below (see discussion from page 120).

## Domestic Law

Human rights have been implemented in domestic law in two forms: as entrenched rights within the *Commonwealth Constitution*; and, as non-entrenched rights within state and commonwealth legislation. This section discusses the effect and enforceability of each form of enactment, beginning with entrenched rights.

A right is said to be entrenched when it cannot be altered by an ordinary Act of parliament. The *Commonwealth Constitution* contains several entrenched human rights.<sup>22</sup> The human rights in the *Constitution* can only be amended when: a majority of the total number of members in each house of the Commonwealth Parliament support the amendment; and, a referendum finds that both a majority of electors in Australia, and a majority of electors in a majority of states, approve of the amendment.<sup>23</sup> The High Court of Australia may invalidate any part of a piece of legislation which conflicts with the operation of an entrenched right in the *Commonwealth Constitution*. However, the *Constitution* does not provide an individual with a cause of action for a remedy if their rights are violated, except to the extent that they are protected from the operation of a constitutionally invalid law that may operate against their interests.

Two types of human rights instruments establish non-entrenched human rights obligations in Australia: specialised human rights legislation (a form of which operates in the Australian Capital Territory and Victoria);<sup>24</sup> and, state constitutions (the right to freedom of religion is included in

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<sup>17</sup> See for example: *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 362 (Mason CJ and Deane J).

<sup>18</sup> See for example: *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan J).

<sup>19</sup> *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

<sup>20</sup> For a discussion of this use see: Wendy Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' (2004) 5 *Melbourne Journal of International Law* 108.

<sup>21</sup> See for example: *Australian Law Reform Commission Act 1996* (Cth) ss 24(1)-(2).

<sup>22</sup> *Commonwealth Constitution* ss 24, 41, 51(xxxi), 80, 92, 116, 117. For an excellent succinct discussion of the rights in the *Constitution* see: Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Final Report No 10 (2007) 29-31.

<sup>23</sup> It should also be noted that this section of the *Commonwealth Constitution* provides that, 'No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the *Constitution* in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.' See: *Commonwealth Constitution* s 128.

<sup>24</sup> *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

the *Tasmanian Constitution*).<sup>25</sup> The Victorian instrument does not create a cause of action for damages for an individual who has had their human rights violated. A person may start a proceeding in the Supreme Court of the Australian Capital Territory against a public authority for relief, not including damages, under the Territory's *Human Rights Act* if they claim the authority breached their human rights.<sup>26</sup> The Australian Capital Territory *Human Rights Act 2004* is generally silent on the availability of damages or compensation as a remedy. However, the Australian Capital Territory *Act* has been held to provide for compensation as a potential remedy for a breach of the right to be free from unlawful arrest and detention.<sup>27</sup>

The human rights legislation in the Australian Capital Territory and Victoria may be overridden by an ordinary Act of parliament. The courts are required to interpret the legislation, so far as it is possible to do so, consistently with their purpose, in a way that is compatible with human rights.<sup>28</sup> The instruments also provide the Supreme Courts in these jurisdictions with the power to declare legislation inconsistent with human rights.<sup>29</sup> However, courts in the Australian Capital Territory and Victoria do not have the power to invalidate legislation which is inconsistent with human rights.<sup>30</sup> The human rights obligations created by domestic law are discussed and analysed in detail below (see discussion from page 120).

## 6.2 Interpreting International Human Rights Treaties

The *Vienna Convention on the Law of Treaties* guides the interpretation of international conventions.<sup>31</sup> Article 31 of the *Convention* requires treaties to be interpreted in good faith and in accordance with the ordinary meaning of the words in their context and in light of the treaty's object and purpose.<sup>32</sup> Article 31(2) states that the context of a treaty includes any agreement or instrument agreed upon by the contracting parties.<sup>33</sup> Article 31(3) also requires treaties to be interpreted in light of 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' and 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.<sup>34</sup> The subsequent practice of states has also been recognised as evidence relevant to the interpretation of the terms of a treaty under customary international law.<sup>35</sup>

The *Convention* also allows recourse to the preparatory work of the treaty (and other supplementary materials) to confirm the interpretation suggested by the ordinary words when the

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<sup>25</sup> *Constitution Act 1934* (Tas) s 46.

<sup>26</sup> *Human Rights Act 2004* (ACT) s 40C.

<sup>27</sup> *Human Rights Act 2004* (ACT) s 18(7). See also: *Morro & Ahadzid v Australian Capital Territory* [2009] ACTSC 118 (Unreported, Gray J, 10 September 2009).

<sup>28</sup> *Human Rights Act 2004* (ACT) s 30; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1).

<sup>29</sup> *Human Rights Act 2004* (ACT) s 30; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36.

<sup>30</sup> *Human Rights Act 2004* (ACT) s 32(3); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(3).

<sup>31</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). This treaty is accepted as a part of international customary law binding on all states, see: *Border and Transborder Armed Action: Jurisdiction of the Court and Admissibility of the Application (Nicaragua v. Honduras)* [1988] ICJ Rep 69, 87-88.

<sup>32</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 31 (entered into force 27 January 1980).

<sup>33</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 31(2) (entered into force 27 January 1980).

<sup>34</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 31(3) (entered into force 27 January 1980).

<sup>35</sup> *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* [1992] ICJ Rep 350, 586.

method of interpretation in Article 31 of the *Convention* leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.<sup>36</sup>

### 6.3 Limiting Human Rights

Several of Australia's human rights obligations are potentially relevant to the practice and regulation of male circumcision. Some rights in the *ICCPR*, such as the right not to be subjected to torture, are explicitly made to be nonderogable which gives them primacy over other rights.<sup>37</sup> Guidance on how various rights ought to be limited or ranked is also provided by limiting provisions in some human rights instruments. These provisions are often of general application. The *Universal Declaration of Human Rights (UDHR)*, which is generally considered to be the first globally applicable human rights instrument, has the following general limitation provision:<sup>38</sup>

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Most limitation provisions, like the one in the *UDHR*, require limitations on human rights to be expressly provided for in domestic law, and, to be made only when there is a clear and legitimate purpose. The *International Covenant on Economic, Social and Cultural Rights* provides that a lawmaker may place limits on the rights in the charter by law '...in so far as this may be compatible with the nature of these rights [in the covenant] and solely for the purpose of promoting the general welfare in a democratic society'.<sup>39</sup> Section 28(1) of the Australian Capital Territory *Act* provides,<sup>40</sup>

Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

Whilst section 7(2) of the Victorian *Act* similarly provides,<sup>41</sup>

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors...

These general limiting provisions provide considerable scope for lawmakers to limit and rank human rights. They also add to the potential for grey areas, and differences between jurisdictions, in the application of human rights law. Some rights have limitation clauses peculiar to them. These will be considered in the detailed discussion of the particular rights below.<sup>42</sup>

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<sup>36</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 32 (entered into force 27 January 1980).

<sup>37</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 4(2) (entered into force 23 March 1976).

<sup>38</sup> *Universal Declaration of Human Rights*, GA Res 2171(III), art 29.2, UN Doc A/810 (1948).

<sup>39</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 4 (entered into force 3 January 1976).

<sup>40</sup> *Human Rights Act 2004 (ACT)* s 28(1). Section 28(2) of the *Human Rights Act* lists a number of factors which ought to be considered when determining whether a limit is reasonable.

<sup>41</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 7(2). Section 7(2) lists a number of factors which ought to be considered when determining whether a limit is reasonable.

<sup>42</sup> Guidance on the limitation and derogation Provisions in the International Covenant on Civil and Political Rights can be found here: United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and*

## 6.4 The Applicable Human Rights

Many proponents in the circumcision debate argue that human rights law supports their position. Several human rights obligations are relevant to circumcision. They can be separated into eight rights and freedoms:

- the right to freedom of religion;
- the right to take part in cultural life;
- the right to be free from torture and all other cruel, degrading, inhumane, or ill treatment;
- the right to life and health;
- the right to private life, family life, autonomy and development;
- the right to security;
- the right to equality and non-discrimination; and
- the right to be free from economic exploitation

A brief summary of the content of each right, its use by proponents in the circumcision debate, and a brief commentary on the particular right's application to circumcision, is provided below.

### The Right to Freedom of Religion

Circumcisions are sometimes performed for religious reasons in Australia. Many articles in UN General Assembly declarations and in treaties ratified by Australia enunciate a freedom of religion. They include: article 18 of the *UDHR*,<sup>43</sup> article 18 of the *ICCPR*,<sup>44</sup> and articles 14 and 30 of the *CRC*,<sup>45</sup> among others.<sup>46</sup> International law provides people with a right to freedom of religion, and a right to manifest their own religion or religious belief in practice and observance, including, as the United Nations Human Rights Committee has noted, in 'participation in rituals associated with certain stages of life'.<sup>47</sup> The protection given to people to manifest their religion is not absolute. The qualification specific to the right in the *ICCPR* is discussed below.

The right to freedom of religion would ordinarily protect a person, including a child who is unable to express their own religious views, from having a religious observance imposed upon them. International law condemns the circumcision of an adult for religious reasons when the person circumcised does not wish to have the procedure performed.<sup>48</sup> The World Health

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*Derogation of Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1984/4 (1984).

<sup>43</sup> *Universal Declaration of Human Rights*, GA Res 2171(III), UN Doc A/810 (1948).

<sup>44</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 18 (entered into force 23 March 1976).

<sup>45</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, arts 14, 30 (entered into force 2 September 1990).

<sup>46</sup> *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR 36, Supp No 51, UN Doc A/36/684 (1981).

<sup>47</sup> Human Rights Committee, *General Comment 22: Article 18*, Sess 48, UN Doc HRI/GEN/1/Rev.1 (1994).

<sup>48</sup> International law experts have universally condemned circumcision of an adult against their wishes. See for example: *Final Report of the Commission of Experts [on the Former Yugoslavia]*, SC Res 780, pt IV(F), UN Doc S/1994/674 (1994).

Organisation has also suggested, implicitly acknowledging the ethical concerns of circumcising an incapable person, that:<sup>49</sup>

...a human rights-based approach to introducing or expanding male circumcision services requires measures to ensure that the procedure can be carried out safely, under conditions of informed consent, and without discrimination.

However, it is not yet clear whether circumcising an incapable child for religious reasons is in breach of the child's right to freedom of religion. This is because international human rights law recognises that parents have, and should have, some influence on the development of their child's religious views, and on the religious practices to which they are exposed.

International law provides parents with some discretion to influence and direct their children in religious matters. The *ICCPR* requires State Parties to respect a parent's liberty to ensure the religious education of their children is in conformity with their own convictions.<sup>50</sup> The *CRC* also recognises the rights and duties of parents to provide direction to their child in the exercise of the child's right to freedom of religion that is in a manner consistent with the evolving capacities of the child.<sup>51</sup> The Australian Human Rights and Equal Opportunity Commission (now the HRC) has previously suggested that:<sup>52</sup>

Male circumcision for religious purposes is protected by the right to freedom of religious practice where it is carried out in a manner that does not constitute cruel, inhuman or degrading treatment or child abuse.

Whether the right of parents to 'direct' and 'influence' their child in religious matters would allow a parent to circumcise their son, before the child is capable of expressing his own view about the procedure and its merit as a religious practice, or even his own religious beliefs, has never been decided by a specialised human rights court or tribunal. However, parent authorised religious circumcisions of minors have previously been held to be human rights compliant in foreign domestic courts.<sup>53</sup>

Nevertheless, it ought to be noted that the right to freedom of religion created by the *ICCPR* is to be limited only by restrictions clearly prescribed by domestic law that are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.<sup>54</sup> The UN Human Rights Committee has suggested that:<sup>55</sup>

[L]imitations may be applied only for those purposes for which they are prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.

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<sup>49</sup> UNAIDS, above n 2.

<sup>50</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 18(3) (entered into force 23 March 1976).

<sup>51</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, arts 5, 14(2) (entered into force 2 September 1990).

<sup>52</sup> Human Rights and Equal Opportunity Commission, above n 3, 59.

<sup>53</sup> See for example: KKO:2008:93 (Finland).

<sup>54</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 18(3) (entered into force 23 March 1976).

<sup>55</sup> Human Rights Committee, 'General Comment 22...', above n 47.

The international instruments do not provide clear guidance to Australia's lawmakers. Whilst it seems clear that the freedom of religion under international law provides protection to people who wish to have themselves circumcised for religious reasons, it remains less clear whether a parent may circumcise their child if the child has not expressed their own desire to be circumcised. Indeed, the imposition of a religious circumcision onto an incapable child may even be a breach of the child's limited right to not have a religious practice imposed upon them. There is, as medical ethicist Rebecca Mussell recognises, a dispute over whether '...the right to "freedom of thought, conscience, and religion," gives parents automatic rights to choose whether their male child should be circumcised...[for religious reasons, or whether] it gives children the right to have a choice when they reach sufficient maturity'.<sup>56</sup>

Freedom of religion is provided for in domestic legislation by both the Australian and Tasmanian constitutions, and the human rights legislation in the Australian Capital Territory and Victoria. Section 116 of the *Commonwealth Constitution* provides:<sup>57</sup>

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

This provision has been interpreted narrowly, and has been held by the High Court to only affect Commonwealth legislation.<sup>58</sup> The protection afforded by s 116 to religious acts, like religious circumcision, is not absolute. The High Court has noted that not all legislative infringements on religious freedom will be invalid.<sup>59</sup> What precisely an undue infringement is has not been established with certainty.<sup>60</sup> Whether the High Court would consider a Commonwealth law regulating or prohibiting aspects of circumcision an undue infringement on religious freedom is unclear. There is also no guidance on whether the High Court might consider a Commonwealth law allowing parents to circumcise their incapable children to be a 'law... for imposing any religious observance'.<sup>61</sup> A Commonwealth law requiring parents to circumcise their children for religious reasons would be an unconstitutional law. However, it is not clear whether a Commonwealth law allowing for the imposition of a religious observance by a private party on another person is a law '...for imposing any religious observance'.<sup>62</sup>

Section 46(1) of the *Tasmanian Constitution* provides: '[f]reedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.'<sup>63</sup> The Tasmanian provision expressly recognises that religious practices may be subject to laws made for public order and morality. Article 14 of the Victorian *Act* provides that every person has the freedom of religion including, 'the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a

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<sup>56</sup> Rebecca Mussell, 'The Development of Professional Guidelines on the Law and Ethics of Male Circumcision' (2004) 30 *Journal of Medical Ethics* 254, 256-257.

<sup>57</sup> *Commonwealth Constitution* s 116.

<sup>58</sup> See: *Krygger v Williams* (1912) 15 CLR 366; *Attorney-General (Vic); ex rel Black v The Commonwealth* (1981) 146 CLR 559; *Adelaide Company of Jehovah's Witnesses Incorporated* (1943) 67 CLR 116.

<sup>59</sup> *Adelaide Company of Jehovah's Witnesses Incorporated* (1943) 67 CLR 116, 128 (Latham CJ).

<sup>60</sup> The High Court of Australia has suggested that the freedom of religion may be restricted when it is essential for the preservation, existence or protection of the community or social order in Australia under the *Commonwealth Constitution*. See: *Adelaide Company of Jehovah's Witnesses Incorporated* (1943) 67 CLR 116, 131-132 (Latham CJ), 149-150 (Rich J), 155 (Starke J).

<sup>61</sup> *Commonwealth Constitution* s 116.

<sup>62</sup> *Commonwealth Constitution* s 116.

<sup>63</sup> *Constitution Act 1935* (Tas) s 46(1).



community, in public or in private.’<sup>64</sup> Article 14 of the Victorian *Act* also recognises the freedom of people to adopt a religion of their choice,<sup>65</sup> and to not be coerced or restrained in this choice.<sup>66</sup> The *Human Rights Act 2004* in the Australian Capital Territory affords the same religious freedoms as the Victorian *Act*.<sup>67</sup>

Domestic legislation seems to provide considerable protection to a person who wishes to be circumcised for religious reasons. However, domestic law, unlike international law, does not make express reference to the right of parents to guide or direct their children in matters of religion. It is not at all clear whether the state and federal domestic human rights law which provides for freedom of religion would protect a parent wishing to circumcise their child for religious reasons.

### The Right to Take Part in Cultural Life

The *International Covenant on Economic, Social and Cultural Rights*, which Australia has ratified, recognises the right of everyone to ‘take part in cultural life’.<sup>68</sup> This same right is specifically provided for children in the *CRC*.<sup>69</sup> The *CRC* provides children with the right to have their education directed to the development of respect for their ‘own cultural identity’.<sup>70</sup> The *ICCPR* also requires states with ‘ethnic, religious or linguistic minorities’ to allow these minorities to ‘enjoy their own culture’.<sup>71</sup> The *UDHR* similarly provides every person with the right to have the ‘cultural rights indispensable for his dignity and the free development of his personality’ realised.<sup>72</sup>

The right to enjoy culture is recognised in domestic human rights legislation in the Australian Capital Territory and Victoria. The Victorian *Act* recognises the right of all persons with a particular cultural background to enjoy their culture.<sup>73</sup> The Australian Capital Territory recognises the right of any person who belongs to an ethnic minority to ‘not be denied the right, with other members of the minority, to enjoy his or her culture...’.<sup>74</sup>

The term culture is not clearly defined in either international or domestic human rights law. The Human Rights Committee hinted that a broad definition of the term may be appropriate when it suggested in its *General Comment No. 23* that culture can manifest itself in many forms.<sup>75</sup> The *Macquarie Dictionary* defines culture as ‘the sum total of ways of living built up by a group of human beings, which is transmitted from one generation to another’.<sup>76</sup> It is quite likely that the

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<sup>64</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14(1)(b).

<sup>65</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14(1)(a).

<sup>66</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14(2).

<sup>67</sup> *Human Rights Act 2004* (ACT) s 14.

<sup>68</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 15(1)(a) (entered into force 3 January 1976).

<sup>69</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, arts 30, 31 (entered into force 2 September 1990).

<sup>70</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 29(1)(c) (entered into force 2 September 1990).

<sup>71</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 27 (entered into force 23 March 1976).

<sup>72</sup> *Universal Declaration of Human Rights*, GA Res 2171(III), arts 22, 27, UN Doc A/810 (1948).

<sup>73</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(1).

<sup>74</sup> *Human Rights Act 2004* (ACT) s 27.

<sup>75</sup> Human Rights Committee, *General Comment No. 23: The Rights of Minorities Article 27*, UN Doc CCPR/C/21/Rev.1/Add.5 (1994).

<sup>76</sup> Arthur Delbridge et al (eds), *The Macquarie Dictionary: Australia's National Dictionary* (2001) 469.

term 'culture' will cover circumcision practices performed as part of a ceremony traditional to a person's way of life. However, it is not at all clear where human rights law may draw the line on circumcision as a significant aspect of a person's cultural life worthy of protection. It is also not clear whether a parent's or child's right to culture would allow a parent to circumcise their child for cultural reasons. Similar considerations to those discussed with regard to the right to religion are also relevant here.

### **The Right to be Free from Torture and all other Cruel, Degrading, Inhumane, or Ill Treatment**

All people, including children, have a right to be free from acts that amount to torture or to cruel, inhuman or degrading treatment or punishment under international law.<sup>77</sup> Children, in particular, are to be free from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.<sup>78</sup> This right is non-derogable and not subject to qualification. Consequently, a circumcision cannot be justified under human rights law if it constitutes ill-treatment. Australia has an obligation to protect people from ill-treatment in its jurisdiction. The European Court of Human Rights has previously held that a state must, in regard to the European Human Rights Convention ill-treatment provision, 'provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.'<sup>79</sup>

The human rights legislation in the Australian Capital Territory and Victoria provides for the right of people to be free from torture, and cruel, inhuman or degrading treatment.<sup>80</sup> They also prohibit the performance of medical treatment on a person unless it is provided with: the free consent of the person treated in the Australian Capital Territory; and, with the free, full and informed consent of the person treated in Victoria.<sup>81</sup>

The purpose of the prohibition on these forms of treatment is, at least under the *ICCPR*, 'to protect both the dignity and physical and mental integrity of the individual'.<sup>82</sup> The *ICCPR* and the Human Rights Committee have chosen not to sharply define the particular terms. The Human Rights Committee has stated that the distinctions depend on 'the nature, purpose, and severity of the treatment applied'.<sup>83</sup> No human rights law instrument, domestic or international, defines any of the ill-treatment terms in any detail, and there is often considerable overlap between them in their application to any given set of facts.

A particular level of severity of harm or a particular malicious or untoward purpose is not specifically required by the terms. However, it seems that each form of prohibited conduct requires a fairly significant level of pain or suffering, and a non-benevolent purpose for the painful treatment.<sup>84</sup> It is likely, since the pain and suffering in every circumcision is inflicted

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<sup>77</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 7 (entered into force 23 March 1976).

<sup>78</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 19(1) (entered into force 2 September 1990).

<sup>79</sup> *Z v United Kingdom* (2002) 34 EHRR 3, [74].

<sup>80</sup> *Human Rights Act 2004* (ACT) s 10; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10.

<sup>81</sup> *Human Rights Act 2004* (ACT) s 10(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10(c).

<sup>82</sup> Human Rights Committee, *General Comment No. 20: Article 7*, Sess 44, Un Doc HRI/GEN/1/Rev.7 (1994).

<sup>83</sup> *Ibid.*

<sup>84</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 7 (entered into force 23 March 1976).

intentionally by a circumciser, that the physical element and level of severity for an act of torture or other form of ill-treatment could be established on the facts of any circumcision. Indeed, the War Crimes Tribunal in *Kvocka* has pointedly suggested that: '[m]utilation of body parts would be an example of acts per se constituting torture.'<sup>85</sup>

However, the context of the harm, and the purpose of the infliction of the harm, at least for most circumcisions, may possibly not be sufficient to establish torture, or any other form of ill-treatment, because the requisite mental or purpose element is lacking.<sup>86</sup> Circumcisions are usually performed in Australia in a spirit of benevolence and with attempts to mitigate pain and suffering, and to promote post procedure healing.<sup>87</sup> Yet, there has been a consistent willingness by experts in human rights law to characterise any excision or cutting, however slight, of the female genitalia as 'cruel, inhumane or degrading treatment' whatever the motivation for, or context of, its performance.<sup>88</sup> Nevertheless, a circumcision performed with a benevolent purpose has never been the subject of a decision in a human rights court, and has not attracted the international condemnation directed at female genital mutilation.

It is unclear whether the prohibition on medical treatment of people who have not provided consent themselves in the Australian Capital Territory and Victorian Acts will apply to circumcisions performed on children. The applicable rule is stated in unqualified terms. Yet, it is clearly not intended to be absolute in application. The general limitation sections still apply to the provision. The explanatory memorandum for the Victorian *Act* also states that Victorian law rightfully recognises 'some well recognised exceptions' to the rule on consent to medical treatment, including, for example, emergency treatment, and, 'where a person is incapable of giving consent and consent is provided by a substitute decision-maker'.<sup>89</sup> It is uncertain whether the circumcision of incapable minors is medical treatment (see discussion from page 62), or an act which is excluded from the operation of the right because it is a well enough recognised exception at law.

## The Right to Life and Health

International law not only prohibits state actors from doing harm, it creates a positive obligation on states to protect and further the health of people within their jurisdiction. Under international law, every person, including a child, has a right to life and the highest attainable standard of

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1976). For an excellent discussion on the elements of torture and the other forms of prohibited conduct see: Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights* (2004) ch 9; English and European jurisprudence has suggested that ill-treatment must attain '...a minimum level of severity' and involve '...actual bodily injury or intense physical or mental suffering.' See for example: *Ireland v United Kingdom* (1978) 2 ECHR 25, [167]; *Pretty v United Kingdom* [2002] 35 EHRR 1, [52]; *Gezer v Secretary of State for the Home Department* [2003] EWHC 860, [14].

<sup>85</sup> *Prosecutor v Miroslav Kvocka, Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub Prcac* (2001) International Criminal Tribunal Yugoslavia (2 November 2001) [144].

<sup>86</sup> For some of the relevant purposes, see: *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, art 1 (entered into force 26 June 1987).

<sup>87</sup> However, it should be noted that it is a breach of international law for a person to conduct medical or scientific experimentation without the consent of the person it is performed upon, irrespective of whether there are efforts taken to mitigate pain and suffering, and to promote post procedure healing, see: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 7 (entered into force 23 March 1976).

<sup>88</sup> See for example: Human Rights Committee, *Concluding Observations of the Human Rights Committee: Lesotho*, [12], UN Doc CCPR/C/79/Add.106 (1999); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Sudan*, [10], UN Doc CCPR/C/79/Add.85 (1997).

<sup>89</sup> Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006 (Vic) clause 10.

physical and mental health.<sup>90</sup> The human rights legislation in the Australian Capital Territory and Victoria also establish the right to life.<sup>91</sup> Australia, under international law, has an obligation to ensure to the maximum extent possible the survival and development of the child.<sup>92</sup> In particular, Australia is obligated, as part of its commitment to protect every person's right to life, to act to reduce infant mortality and take, 'all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.'<sup>93</sup> Circumcision is a traditional practice for some communities in Australia, and may be, at least arguably, prejudicial to the health of children (see discussion from page 12).<sup>94</sup>

The interplay between circumcision and the right to life and health may be clarified by making reference to how the relevant law has been held to apply to female genital mutilation. Female genital mutilation is considered to be a breach of the right to life and health. It is deemed to be a practice harmful to health because, like non-therapeutic circumcision, it is an unnecessary surgical procedure with the inherent possibility of complications.<sup>95</sup> However, it cannot be said with certainty whether male circumcision will always be classified as a breach of the right to life and health. This is because the practice is relatively safe and is only very rarely life threatening or associated with serious complications (at least when it is performed in safe and sterile conditions); the practice has potential prophylactic health benefits; and, it is regarded as important to the healthy psychological development of some people.

Should male circumcision be considered a traditional practice harmful to health, Australia would be required under international law to, as human rights scholar John Tobin notes, 'take a combination of whatever measures are necessary - legislative, administrative, social and educational' to ensure the effective eradication of the practice.<sup>96</sup> These measures may include: providing support for the collection and dissemination of research about the practice; discouragement of those who seek circumcisions without a thorough understanding of the practice; encouragement of politicians and community leaders to cooperate in influencing people against the practice, and, when it would be effective, passing prohibiting legislation.<sup>97</sup>

### **The Right to Private Life, Family Life, Autonomy and Development**

International law requires Australia to enact domestic law which prohibits arbitrary or unlawful interference with a person's privacy and family.<sup>98</sup> The human rights Acts in the Australian Capital Territory and Victoria also recognise that people have a right not to have their privacy or family

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<sup>90</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 12.1 (entered into force 3 January 1976).

<sup>91</sup> *Human Rights Act 2004* (ACT) s 9; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 9.

<sup>92</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 6(2) (entered into force 2 September 1990).

<sup>93</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 24(3) (entered into force 2 September 1990).

<sup>94</sup> For a discussion on the traditional practices prejudicial to health provision see: John Tobin, 'The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does It Mean and Require of States?' (2009) 9 *Human Rights Law Review* 373.

<sup>95</sup> World Health Organisation et al, *Eliminating Female Genital Mutilation: An Interagency Statement* (2008) 8.

<sup>96</sup> John Tobin, above n 94.

<sup>97</sup> For an application of the terms 'with a view to abolishing' in the context of female genital mutilation see: The Committee on the Elimination of Discrimination against Women, *General Recommendation No 14*, UN Doc HRI/GEN/1/Rev.6 (2003).

<sup>98</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 17 (entered into force 23 March 1976).

unlawfully or arbitrarily interfered with.<sup>99</sup> The Human Rights Committee has suggested previously that ‘the notion of privacy refers to the sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone.’<sup>100</sup> The Australian Capital Territory Human Rights Commission has suggested that the concept of ‘private life’ in the *European Convention on Human Rights*, which includes protecting ‘...a person’s physical and psychological integrity’ and aspects of their ‘...physical and social identity’ from interference,<sup>101</sup> is analogous to the right to privacy in the Australian Capital Territory.<sup>102</sup> The protection afforded to a person’s physical and psychological integrity under the right to privacy in the European Convention extends to protection from acts which cause harm at a level of severity which may not meet the threshold of torture or inhuman or degrading treatment.<sup>103</sup> Interferences with a person’s privacy must, under international law, be justified by a domestic law that is accessible, stated with precision, conforms to international law, and is reasonable in the circumstances it is applied to.<sup>104</sup>

The right to freedom from interference in privacy and family life may be relevant in three ways. First, the state may be under an obligation to stop parents from interfering in their incapable child’s right to privacy by having them circumcised. Secondly, the state may be obligated to not pass legislation interfering with circumcision practices because such a law may be an inappropriate interference with the privacy or family life of the people wishing to circumcise. Thirdly, a point somewhat related to the second, the state may be obligated under international law to allow for the lawfulness of circumcision performed on minors because a ban on the practice may be an inappropriate interference with the development of the minor’s psychological and social identity.

Articles 3 and 5 of the *CRC* and Article 24 of the *ICCPR* recognise the role of parents in directing and guiding their children in their development and their exercise of their human rights.<sup>105</sup> The Committee on the Rights of the Child has previously interpreted ‘development’ in the context of Article 6 of the *CRC* broadly:<sup>106</sup>

The Committee expects States to interpret ‘development’ in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development.

The Human Rights Committee has also recognised that:<sup>107</sup>

...it is primarily incumbent on the family, which is interpreted broadly to include all persons composing it in the society of the State party concerned, and particularly on the parents, to create conditions to promote the harmonious development of the child’s personality and his enjoyment of the rights recognized in the Covenant.

<sup>99</sup> *Human Rights Act 2004* (ACT) s 12(a); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a).

<sup>100</sup> *Coeriel and Aurik v. The Netherlands*, Human Rights Committee Communication No. 453/1991, [10.2], U.N. Doc. CCPR/C/52/D/453/1991 (1994).

<sup>101</sup> *Botta v Italy* (1998) 26 EHRR 241, 257.

<sup>102</sup> Human Rights Commission, *The Right to Privacy and Reputation* (2006) 1.

<sup>103</sup> *Raninen v Finland* (1997) 26 EHRR 563, [IV].

<sup>104</sup> Human Rights Committee, *General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation Article 17*, Sess 32, UN Doc HRI/GEN/1/Rev.6 (1988).

<sup>105</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 24 (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, arts 3, 25 (entered into force 2 September 1990).

<sup>106</sup> Committee on the Rights of the Child, *General Comment No 5*, [6], UN Doc CRC/GC/2003/5 (2003).

<sup>107</sup> Human Rights Committee, *General Comment No. 17: Rights of the Child Article 24*, sess 35, Un Doc HRI/GEN/1/Rev.6 (1989).

The right of parents to direct and guide the development of their child free from state interference is undoubtedly qualified. Parents must, for example, act in the best interests of their child (this principle is discussed in detail in relation to domestic law in chapter four, see discussion from page 80). Legal scholar Michael Freeman has suggested that international law, and the best interests of the child concept, requires parents to make decisions as to the development of their child on the basis of 'future orientated consent', a term he borrows from Gerald Dworkin, and which is at the heart of the future orientated consent approach to protecting a minor's autonomy discussed in chapter two (see discussion from page 33).<sup>108</sup> Freeman states:<sup>109</sup>

The question at its simplest is: can the restrictions be justified in terms that the child would eventually come to appreciate? Looking back, would the child appreciate and accept the reason for the restriction imposed upon him or her, given what he or she now knows as a rationally autonomous and mature adult?

Parents may also only provide guidance and direction to their child in a manner consistent with the evolving capacities of the child.<sup>110</sup> Children, even before they reach the age of majority, may be able to exercise their rights themselves.

Whether the right to privacy prohibits, requires, or allows a state to prohibit a parent from circumcising their child is uncertain. It may be that parents, potentially, have the power to circumcise their child in some circumstances under the right to privacy and family life, and due to their role in directing their child's development. Ultimately, it must be acknowledged that the right to privacy and family life without arbitrary or unlawful interference does not appear to provide a clear direction on how the law should respond to the circumcision of incapable minors.

### **The Right to Security**

Everyone has the right to security of their person under the *ICCPR*.<sup>111</sup> Australia is obligated under international law to take action to protect any person who has their physical security threatened within its jurisdiction.<sup>112</sup> This right is not specifically qualified. The obligation on Australia's lawmakers extends to making significant efforts to protect people from attacks and physical interference by private actors.<sup>113</sup> It may be a breach of a minor's right to security under international law to be circumcised without their consent. However, an action interfering with a person's physical security will only be a breach of a person's right to security under international law if the action is unlawful under domestic law, or unlawful under international human rights law. Consequently, greater speculation on the application of the international law right to security to the circumcision of minors is not possible until there is greater certainty in relation to the application of domestic and international law to circumcision.

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<sup>108</sup> Gerald Dworkin, 'Paternalism' in Richard Wasserstrom (ed), *Morality and the Law* (1971) 119.

<sup>109</sup> Michael Freeman, *The Moral Status of Children* (1997) 39.

<sup>110</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 5 (entered into force 2 September 1990).

<sup>111</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 9 (entered into force 23 March 1976). There are subtle differences to how the right to security of person is interpreted in other international conventions and national legislation. For a discussion see, Rhonda Powell, *Security and the Right to Security of Person* (D Phil Thesis, Oxford University, 2008).

<sup>112</sup> This obligation was discussed in: *Delgado Páez v Columbia*, Human Rights Committee Communication No (195/1985).

<sup>113</sup> *Delgado Páez v Columbia*, Human Rights Committee Communication No (195/1985).

The human rights legislation in the Australian Capital Territory and Victoria provides for the right to security of person.<sup>114</sup> However, the scope of the right under domestic law is unclear, but is seemingly more limited than the right under international law. The explanatory memorandum to the Victorian *Act* suggests that the right was not intended to apply to physical security of a person outside the context of deprivations of liberty.<sup>115</sup> The memorandum states, in particular, that the right was ‘...not intended to extend to such matters as a right to bodily integrity, personal autonomy or a right to access medical procedures.’<sup>116</sup> This interpretation conforms to the interpretation given to the right in the *Convention for the Protection of Human Rights and Fundamental Freedoms* by the European Court of Human Rights.<sup>117</sup> This interpretation of the right in the Victorian *Act*, if correct, is different from and more limited than the interpretation given to the right in the *ICCPR* by the Human Rights Committee. This interpretation would not include most circumcisions performed in Victoria. The full scope of the Australian Capital Territory right is yet to be authoritatively clarified.

### The Right to Equality and Non-discrimination

International law prohibits discrimination in the application of human rights law.<sup>118</sup> The House of Lords in *Wandsworth London Borough Council v Michalak*<sup>119</sup> proposed a useful four step analysis to the application of the discrimination provisions in human rights law:

- 4) Do the facts fall within the ambit of one or more of the substantive provisions [of the human rights charter]?
- 5) Was there different treatment between the complainant and the comparators?
- 6) Were the comparators in an analogous situation to the complainant?
- 7) If so did the differential treatment pursue a legitimate aim and bear a reasonable relationship of proportionality to the aim?

Female genital mutilation is illegal in Australia. Whether the different way the law treats male and female genital mutilation amounts to relevant discrimination under international law is uncertain. The determination will probably depend upon the extent to which the arbiter considers the two situations analogous, and perhaps, whether the arbiter considers the differential treatment to be pursuing a legitimate aim. The determination will also be difficult to make until the domestic law regulating circumcision becomes clearer.

The human rights legislation in the Australian Capital Territory and Victoria also provide for the right for people to enjoy their human rights without discrimination.<sup>120</sup> This legislation provides people with the right to equal protection of the law without discrimination.<sup>121</sup> The Victorian *Act*

<sup>114</sup> *Human Rights Act 2004* (ACT) s 18(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(1).

<sup>115</sup> Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006 (Vic) Clause 21.

<sup>116</sup> Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006 (Vic) Clause 21.

<sup>117</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 5, art 5 (entered into force 3 September 1953). For a general discussion of the right see: Monica Macovei, *The Right to Liberty and Security of the Person: A Guide to the Implementation of Article 5 of the European Convention of Human Rights*, Human Rights Handbook No 5 (2004).

<sup>118</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, arts 2, 26 (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, arts 2, 24 (entered into force 2 September 1990).

<sup>119</sup> *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 625 (Brooke LJ).

<sup>120</sup> *Human Rights Act 2004* (ACT) s 8(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(2).

<sup>121</sup> *Human Rights Act 2004* (ACT) s 8(3); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(3).

specifies that ‘discrimination, in relation to a person, means discrimination (within the meaning of the *Equal Opportunity Act 1995*) on the basis of a listed attribute in section 6 of that Act’.<sup>122</sup> The Australian Capital Territory *Act*, although not defining the term discrimination, also makes reference to the discrimination *Act* operating in their jurisdiction as a source of human rights.<sup>123</sup>

The Commonwealth, and each Australian state and territory, has enacted anti-discrimination law. Federal law, relevantly, prohibits discrimination based upon sex, age and race (including ethnic origin) in the provision of services.<sup>124</sup> Laws in each state and territory, differing subtly in terminology, also prohibit discrimination on the grounds of: sex,<sup>125</sup> age,<sup>126</sup> race,<sup>127</sup> and, except in South Australia and New South Wales, religious activity or religious belief/conviction,<sup>128</sup> in the provision of services.<sup>129</sup> Each anti-discrimination Act in Australia makes a distinction between direct discrimination and indirect discrimination. The definitions of the two types of discrimination are similar but not uniform across the various anti-discrimination Acts. Direct discrimination is, essentially, unlawful treatment that occurs when someone is treated less favourably than another person, or is disadvantaged on the basis of an attribute (race for example), and in connection with an area of activity (for example, the provision of a service), covered by the particular Act.<sup>130</sup> Indirect discrimination occurs when a condition, requirement, or practice is imposed on a person that has the effect of unreasonably and disproportionately disadvantaging a group of people who share an attribute covered under the particular Act, more than people who are not in the disadvantaged group because they do not have the relevant attribute.<sup>131</sup> The Northern Territory does not provide for actions brought for indirect

<sup>122</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 3 “Discrimination”.

<sup>123</sup> *Human Rights Act 2004* (ACT) s 7(example 1); *Discrimination Act 1991* (ACT).

<sup>124</sup> *Sex Discrimination Act 1984* (Cth); *Age Discrimination Act 2004* (Cth); *Racial Discrimination Act 1975* (Cth).

<sup>125</sup> *Discrimination Act 1991* (ACT) s 1(a); *Anti-Discrimination Act 1977* (NSW) pt 3; *Anti-Discrimination Act 1996* (NT) s 19(b); *Anti-Discrimination Act 1991* (Qld) s 7(a); *Equal Opportunity Act 1984* (SA) s 29; *Anti-Discrimination Act 1998* (Tas) s 16(e); *Equal Opportunity Act 1995* (Vic) s 6(k); *Equal Opportunity Act 1984* (WA) s 8.

<sup>126</sup> *Discrimination Act 1991* (ACT) s 7(1)(l); *Anti-Discrimination Act 1977* (NSW) pt 4G; *Anti-Discrimination Act 1996* (NT) s 19(d); *Anti-Discrimination Act 1991* (Qld) s 7(f); *Equal Opportunity Act 1984* (SA) s 85A; *Anti-Discrimination Act 1998* (Tas) s 16(b); *Equal Opportunity Act 1995* (Vic) s 6(a); *Equal Opportunity Act 1984* (WA) pt IVB.

<sup>127</sup> *Discrimination Act 1991* (ACT) s 7(1)(h); *Anti-Discrimination Act 1977* (NSW) s 7; *Anti-Discrimination Act 1996* (NT) s 19(a); *Anti-Discrimination Act 1991* (Qld) s 7(g); *Equal Opportunity Act 1984* (SA) s 51; *Anti-Discrimination Act 1998* (Tas) s 16(a); *Equal Opportunity Act 1995* (Vic) s 6(i); *Equal Opportunity Act 1984* (WA) pt III.

<sup>128</sup> *Discrimination Act 1991* (ACT) s 7(1)(i) (religious conviction only); *Anti-Discrimination Act 1996* (NT) s 19(m); *Anti-Discrimination Act 1991* (Qld) s 7(i); *Anti-Discrimination Act 1998* (Tas) ss 16(o)-(p); *Equal Opportunity Act 1995* (Vic) s 6(j); *Equal Opportunity Act 1984* (WA) pt IV (religious conviction only).

<sup>129</sup> *Discrimination Act 1991* (ACT) s 20; *Anti-Discrimination Act 1977* (NSW) ss 19, 33, 49ZYN; *Anti-Discrimination Act 1996* (NT) s 28(d); *Anti-Discrimination Act 1991* (Qld) s 46; *Equal Opportunity Act 1984* (SA) ss 39, 61, 85K; *Anti-Discrimination Act 1998* (Tas) s 22(c); *Equal Opportunity Act 1995* (Vic) s 42; *Equal Opportunity Act 1984* (WA) ss 20, 46, 62, 66ZF.

<sup>130</sup> *Discrimination Act 1991* (ACT) s 8(1)(a); *Anti-Discrimination Act 1996* (NT) s 20; *Anti-Discrimination Act 1991* (Qld) s 10; *Anti-Discrimination Act 1998* (Tas) s 14; *Equal Opportunity Act 1995* (Vic) s 8. The discrimination Acts in New South Wales, South Australia and Western Australia do not have an overarching provision defining direct discrimination. The Acts in these jurisdictions define how a person can be discriminated against every time a relevant attribute is discussed in the particular Act, see: *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA).

<sup>131</sup> *Discrimination Act 1991* (ACT) s 8(1)(b); *Anti-Discrimination Act 1991* (Qld) s 11; *Anti-Discrimination Act 1998* (Tas) s 15; *Equal Opportunity Act 1995* (Vic) s 9. The discrimination Acts in New South Wales, South Australia and Western Australia do not have an overarching provision defining indirect discrimination. The Acts in these jurisdictions define how a person can be discriminated against every time a relevant attribute is discussed in the particular Act: *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA).



discrimination. Most discrimination legislation places a limitation on the time, usually 12 months or less, in which a discrimination complaint may ordinarily be lodged.<sup>132</sup>

There are many potential discrimination law issues in connection with male circumcision that are yet to be resolved. They include: whether prohibiting the performance of female genital mutilation but not male circumcision is discriminatory; whether prohibiting circumcisions for some reasons but not others is discriminatory; and whether a circumcision provider may be able to choose on the grounds of age, race or religion to whom they offer their services. The answers to such questions may depend upon how the service provided is defined. For example, most public hospitals in Australia only provide therapeutic circumcision. The refusal of a public hospital to perform religious circumcisions would probably not be deemed to be discriminatory because public hospitals are generally in the business of providing therapeutic treatment and not non-therapeutic or religious procedures. It may also depend upon whether an analogy can be made between acts, male genital modification and female genital mutilation for example, said to illustrate the difference and the discrimination in the treatment.<sup>133</sup>

### **The Right to be Free from Economic Exploitation**

Australia is required by international law to protect children from economic exploitation.<sup>134</sup> There are two scenarios in which claims of economic exploitation have been levelled against circumcision providers.<sup>135</sup> The first scenario is when a circumciser benefits economically from encouraging the performance of unnecessary circumcisions. This criticism can be made because circumcision is relatively easy to perform, Medicare subsidised, and profitable to perform in some circumstances. It is also a procedure commonly performed on children too young to consent to the procedure themselves, and one which is performed by a person who may be perceived as being in a position of authority (by virtue of their knowledge or social standing) by the person capable of authorising the procedure.

The second scenario where economic exploitation may be possible occurs after the foreskin has been excised. For example, human foreskins, or often extracts from them, can be used to produce skin for skin grafts, insulin, and other medical products.<sup>136</sup> Circumcisers who charge for performing the procedure, and who then also surreptitiously sell the excised foreskin for financial gain, could be economically exploiting the person from whom the foreskin came.

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<sup>132</sup> *Anti-Discrimination Act 1977* (NSW) s 89(b); *Anti-Discrimination Act 1996* (NT) s 65(2); *Anti-Discrimination Act 1991* (Qld) s 138(2); *Equal Opportunity Act 1984* (SA) s 93(2a); *Anti-Discrimination Act 1998* (Tas) s 63(2); *Equal Opportunity Act 1995* (Vic) s 108; *Equal Opportunity Act 1984* (WA) s 83(4).

<sup>133</sup> There are significant similarities between circumcision and some of the more minor forms of female genital mutilation. For a discussion of the similarities, and an argument that an analogy between the practices can be made, see: Debra DeLaet, 'Framing Male Circumcision as a Human Rights Issue? Contributions to the Debate over the Universality of Human Rights' (2009) 8 *Journal of Human Rights* 405.

<sup>134</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 32(1) (entered into force 2 September 1990).

<sup>135</sup> For an example of such claims, and references to others who have made similar claims, see: Sirkuu Hellsten, 'Rationalising Circumcision: From Tradition to Fashion, from Public Health to Individual Freedom—Critical Notes on Cultural Persistence of the Practice of Genital Mutilation' (2004) 30 *Journal of Medical Ethics* 248, 251.

<sup>136</sup> See for example: Outi Hovatta et al, 'A Culture System Using Human Foreskin Fibroblasts as Feeder Cells Allows Production of Human Embryonic Stem Cells' (2003) 18 *European Society of Human Reproduction and Embryology* 1404; Scott Oates and Arun Gosain, 'Syndactyly Repair Performed Simultaneously with Circumcision: Use of Foreskin as a Skin-Graft Donor Site' (1997) 32 *Journal of Pediatric Surgery* 1482; Dermagraft, *Dermagraft Frequently Asked Questions* (2009) <[http://www.dermagraft.com/html/1\\_info/faqs.html#4](http://www.dermagraft.com/html/1_info/faqs.html#4)> at 20 October 2010

The human rights legislation in the Australian Capital Territory and Victoria do not recognise the right to be free from economic exploitation. The Australian Capital Territory *Act* does not recognise any economic or property related human rights. The Victorian *Act* recognises that a person may not 'be deprived of his or her property except in accordance with law'.<sup>137</sup> However, the intended effect, or the effect the court is likely to accept, of this right is not clear as the right does not seem to establish any property right which is not already recognised by law. Some of the domestic property law relevant to circumcision, which may protect people from such financial exploitation, is discussed in chapter five (see discussion from page 110).

## 6.5 Critical Analysis

The law does not provide clear and authoritative guidance on when or whether the practice and regulation of circumcision in Australia is in accordance with human rights. There is considerable dispute as to how several of the rights apply to the practice and regulation of circumcision. There is even greater dispute over how the various and sometimes conflicting rights relevant to circumcision should be weighed. It is not clear whether human rights law condones or condemns all or only some circumcisions performed on young children. The limitation provisions in the various domestic and international human rights instruments seem to allow considerable scope for lawmakers to determine how the various rights apply to circumcision.

However, international law does provide guidance to Australia's lawmakers and administrators. International human rights law, although not addressing circumcision directly, suggests that efforts should be made to: minimise harm and potential risk if circumcision is to be performed (see discussion from page 125); discourage the performance of circumcision on children too young to consent to the procedure themselves unless there are strong reasons for its performance in the particular circumstances, and protect the right of adults, and mature minors, to have circumcisions performed on themselves if they so desire it (see discussion from page 126); ensure that if there are good reasons for circumcising that no person is discriminated against in the provision of the service (see discussion from page 129); and, ensure that the relevant human rights law obligations, and any proper limits to these obligations, are enshrined in clear and accessible domestic law. This analysis accords generally with the advice provided by The Joint United Nations Programme on HIV/AIDS that a human rights-based approach to introducing or expanding circumcision services for HIV prevention would require measures to 'ensure that the procedure can be carried out safely, under conditions of informed consent, and without discrimination'.<sup>138</sup>

Human rights law is of limited utility in regard to the regulation of circumcision. It does not provide clear guidance for the regulation of any aspect of the practice of circumcision. Furthermore, the human rights law instruments relevant in Australia do not, except for the *Commonwealth Constitution*, impose enforceable obligations on Australia's lawmakers. However, the inability of human rights law to effectively regulate any aspect of circumcision does not necessarily require reform. This is because the human rights law obligations largely act to assist in a normative fashion in the proper interpretation, application, formation and reform of the regulatory laws in Australia which do create legally enforceable obligations. Human rights provide courts, legislators and administrators with a problem solving guide, rather than clear cut solutions to particular problems.

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<sup>137</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20.

<sup>138</sup> UNAIDS, above n 2.

## 6.6 Concluding Remarks

This chapter considered the domestic and international human rights law obligations relevant to circumcision in the Australian context. The analysis found that the relevant domestic and international human rights instruments do not address male circumcision in particular, and were not enacted to regulate circumcision. Indeed, human rights obligations are, on the whole, too nondescript and weak to meaningfully regulate an issue as complex and divisive as male circumcision. Australia's human rights law obligations are, more often than not, best considered by a law reformer as an important influence on law reform,<sup>139</sup> rather than an area of law which requires reform to further a policy agenda.

The experience of foreign jurisdictions, and their particular regulatory approach, is another potential influence on law reform. The next chapter discusses the specialised circumcision regulatory law in Sweden, South Africa and the United States. The historical experience with circumcision of each of these jurisdictions is addressed in the chapter to contextualise the discussion of the law. The regulatory options utilised overseas are also analysed for their potential suitability in an Australian context. This coverage provides the final stage of analysis before a way forward for Australia is recommended in chapter eight, the concluding chapter.

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<sup>139</sup> The role of human rights as an influence in law reform is explicitly recognised by the Australian Law Reform Commission. The commission must 'aim at ensuring that the laws, proposals and recommendations it reviews, considers or makes... are, as far as practicable, consistent with the International Covenant on Civil and Political Rights.' See: *Australian Law Reform Commission Act 1996* (Cth) s 24(b).

# Legislation in Foreign Jurisdictions

This chapter analyses the legislation in foreign jurisdictions which specifically addresses male circumcision. Very few foreign jurisdictions have enacted legislation directed to the regulation of circumcision. South Africa, along with three of its provinces, and Sweden are the only jurisdictions which have done so. The following two sections focus upon these jurisdictions, the relevant law, and their experience with circumcision. Consideration is then given to the legislation in some states of the United States of America which expressly refer to male circumcision. Australia's experience with circumcision, and its regulation, is compared with that of the jurisdictions discussed.

## 7.1 South Africa

Both federal and provincial legislation regulates circumcision in South Africa. The legislation in South Africa and three of its provinces – Eastern Cape, Limpopo and Free State – reflects the fact that male circumcision has, and continues to be, widely practised for ethnicity related reasons in a traditional manner and outside medical facilities in South Africa. These circumcisions are usually performed in special 'circumcision schools'. Initiates of these schools, typically in their mid to late teens to their early twenties, are separated from their families and taken for a period of many days, and even weeks.<sup>1</sup> They are circumcised and led through several initiatory ceremonies and lessons. The schools often operate at hygiene, pain relief, ethical, surgical and post-surgery care standards far below that which could be expected from a modern medical facility. Indeed, there is a disturbingly high mortality rate for those who are circumcised in South Africa's circumcision schools.<sup>2</sup> Dozens of young men die annually because of the practices at these schools. The incidence rate of other serious and horrific complications, such as the removal of all or a large portion of the shaft of the penis, is also alarmingly high.<sup>3</sup>

Much of the legislation regulating circumcision in South Africa is designed to ensure a basic level of both health care and of autonomy in the decision making of those who are circumcised. Federal law in South Africa offers legal protection from circumcision to minors who are chronically ill, disabled, or who are mature enough to express their wish to not be circumcised.<sup>4</sup> The relevant law also makes respecting, protecting, promoting, and fulfilling the best interests of

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<sup>1</sup> There is no set age at which initiates are circumcised. Circumcisions used to be, and are still sometimes, performed upon children under the age of ten, see: I.P. Crowley and K.M. Kesner, 'Community Perception of Traditional Circumcision in a Sub-Region of the Transkei, Eastern Cape, South Africa' (2005) 47 *BMC Public Health* 58, 58.

<sup>2</sup> For the official circumcision complication statistics of the Eastern Cape of South Africa see: Eastern Cape Department of Health, *Summary of Seasonal Statistics Since June 2001: Mutilations and deaths from 2001 to 2006* (2006) <<http://www.ecdoh.gov.za/uploads/files/120707095947.pdf>> at 20 October 2010; Eastern Cape Department of Health, *Statistics for June: 2007* (2007) <<http://www.ecdoh.gov.za/uploads/files/281107142127.pdf>> at 20 October 2010.

<sup>3</sup> At least seventy men lost their genitals due to practices in circumcision schools between 1995 and 2005, see: Peter Apps, 'Deaths Prompt Action on Circumcision Schools', *Independent Online* (South Africa) 28 July 2005 <[http://www.iol.co.za/index.php?set\\_id=1&click\\_id=&art\\_id=qw1119962881870B265](http://www.iol.co.za/index.php?set_id=1&click_id=&art_id=qw1119962881870B265)> at 20 October 2010. Other sources suggest that as many as 200 men lost their genitals between 2001 and 2006, see: Karl Peltzer, 'Traditional Male Circumcision Remains A Dangerous Business' (2008) 6 *Human Sciences Research Council Review* 5, 5.

<sup>4</sup> *Children's Act 2005* (RSA) ss 11(3), 12(10).

the child a requirement in any decision involving a child brought before a court.<sup>5</sup> It also requires children over the age of sixteen to provide their own consent to the procedure, and for the child to be given proper counselling prior to the performance of the procedure.<sup>6</sup> Federal law only allows children under the age of sixteen to be circumcised for religious reasons, or on the recommendation of a medical practitioner for medical reasons.<sup>7</sup>

The provinces of Eastern Cape,<sup>8</sup> Limpopo<sup>9</sup> and Free State<sup>10</sup> have enacted further and more detailed regulatory legislation. The relevant statutes limit who may perform circumcisions; limit where circumcisions may be performed; allow the state to regulate how, and under what conditions circumcisions are performed; require the people who are to be circumcised to undergo and pass a medical examination prior to their circumcision; set limits on how old a person must be before they can be circumcised; require consent of a parent or guardian for minors who are under a specific age; and allow for inspections of circumcisers' equipment, buildings, and their patients by a government official.

It is difficult to judge the effectiveness of the regulatory regime in South Africa. Statistics suggest that the law has been unable to affect significant change in Eastern Cape, a province with a very large circumcising community. Commentary has suggested that the legal regime will not, without greater support from traditional surgeons, parents and the initiates themselves, be successful in reducing the mortality rate.<sup>11</sup> It has also suggested, in particular, that tension between traditional leaders and the state is a primary cause of the lack of positive results from the interventions by the government.<sup>12</sup> There were more than one hundred deaths and two hundred penis amputations between 2001 and 2006 in Eastern Cape.<sup>13</sup> Eighty circumcision school participants died (including two suicides), in what an Eastern Cape health spokesperson described as a 'disastrous year', as recently as 2009.<sup>14</sup> However, Eastern Cape officials have made dozens of arrests, convicted several illegal circumcision school practitioners, and have closed several illegal schools each year.<sup>15</sup> Government monitoring of circumcision schools has seen hundreds of young men - over 500 men in 2005 alone - harmed in illegal circumcision schools receive medical treatment in hospitals.<sup>16</sup>

## 7.2 Sweden

Circumcision is not a traditional practice in Sweden. The practice of circumcision was limited almost exclusively to Sweden's small Jewish community until relatively recently. Circumcision

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<sup>5</sup> *Children's Act 2005* (RSA) ss 6(2)(a), 9.

<sup>6</sup> *Children's Act 2005* (RSA) s 12(9).

<sup>7</sup> *Children's Act 2005* (RSA) s 12(8).

<sup>8</sup> *Application of Health Standards in Traditional Circumcision Act 2001* (Eastern Cape).

<sup>9</sup> *Northern Province Circumcision Schools Act 1996* (Limpopo).

<sup>10</sup> *Free State Initiation School Health Act 2004* (Free State).

<sup>11</sup> See for example: Ortrun Meissner and David Buso, 'Traditional Male Circumcision in the Eastern Cape – Scourge or Blessing?' (2007) 97 *Southern Africa Medical Journal* 371, 373.

<sup>12</sup> For a discussion see: Thembela Kepe, 'Secrets' that kill: Crisis, Custodianship and Responsibility in Ritual Male Circumcision in the Eastern Cape Province, South Africa' (2010) 70 *Social Science and Medicine* 729.

<sup>13</sup> Karl Peltzer, above n 3, 5.

<sup>14</sup> Robin McKie, 'Thousands Face Agony or Death After Zulu King's Circumcision Decree', *The Observer* (United Kingdom) 17 January 2010 <<http://www.guardian.co.uk/world/2010/jan/17/circumcision-zulu-south-africa-hiv>> at 20 October 2010.

<sup>15</sup> Louise Vincent, 'Cutting Tradition: the Political Regulation of Traditional Circumcision Rites in South Africa's Liberal Democratic Order' (2008) 34 *Journal of Southern African Studies* 77, 81.

<sup>16</sup> Louise Vincent, *Male Circumcision Policy, Practices and Services in the Eastern Cape Province of South Africa: Case Study* (2008) 41.

was, for centuries, of little legal or political concern. However, an influx of Muslim immigrants, bringing the practice of circumcision with them, and a high profile death attributed to a religious circumcision, encouraged Sweden's parliament to pass legislation regulating the practice.<sup>17</sup> Sweden's Government, concerned about an increase in unregulated 'kitchen table' circumcisions, did not favour a proposal to ban the circumcision of minors at the time of enacting the legislation.<sup>18</sup> Instead, the Parliament preferred an approach which focused upon improving health and ethical standards of circumcisers, and limiting when and by whom certain circumcisions can be performed.<sup>19</sup> Sweden's parliament enacted a comprehensive legislative regulatory scheme.<sup>20</sup> The law was passed with criticism locally and internationally by religious circumcising groups.<sup>21</sup>

The law in Sweden applies to any operation, on a boy younger than 18, that fully or partially removes the foreskin, and that is not for the purpose of the prevention, investigation or treatment of medical disease and injury.<sup>22</sup> The *Act* requires the circumciser to provide information about the procedure to the minor to be circumcised if the minor is capable of understanding it.<sup>23</sup> It also requires the circumciser to determine the minor's views about the procedure, and prohibits the performance of a circumcision against the will of the minor to be operated upon.<sup>24</sup>

A parent or guardian may request, or consent to, the performance of a circumcision on their child after they and their child have been informed of the implications of the procedure.<sup>25</sup> If custody of the boy is shared, both parents must be provided with the relevant information, and both must consent to the procedure.<sup>26</sup> Parties required to consent to the procedure ought to be informed about: the right of the child, if competent, to refuse the procedure; how the surgery will be performed; the pain the circumcised person may experience; the risks and potential complications of the procedure; the requirements of after procedure care; and the irreversible nature of the procedure.<sup>27</sup>

The procedure itself must be performed with anaesthetic administered by a registered nurse or medical practitioner under hygienic conditions in a manner that is in the best interests of the child.<sup>28</sup> Only registered medical practitioners may circumcise boys over two months of age.<sup>29</sup> A boy under the age of two months may be circumcised by either a registered medical practitioner or a person holding a special circumcision licence.<sup>30</sup> A person applying for a licence must establish that they have the knowledge and experience to perform circumcisions at a standard equivalent to a circumciser in the health service.<sup>31</sup> The practice of a licensed circumciser is subject to government monitoring, inspection and information collection. A licensed circumciser

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<sup>17</sup> 'Sweden Restricts Circumcisions', *BBC News* (United Kingdom) 1 October 2001 <<http://news.bbc.co.uk/2/hi/europe/1572483.stm>> at 20 October 2010.

<sup>18</sup> Socialstyrelsen, *Omskärelse av pojkar: Rapport av ett regeringsuppdrag (S2005/7490/SK)* (2007) 12.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Circumcision of Boys Act 2001:499* (Sweden).

<sup>21</sup> Canadian Children's Rights Council, *Jews Protest Swedish Circumcision Restriction* (2001) <[http://www.canadiancrc.com/Newspaper\\_Articles/Jews\\_Protest\\_Swedish\\_Circumcision\\_Restriction\\_07JUN01.aspx](http://www.canadiancrc.com/Newspaper_Articles/Jews_Protest_Swedish_Circumcision_Restriction_07JUN01.aspx)> at 20 October 2010.

<sup>22</sup> *Circumcision of Boys Act 2001:499* (Sweden) s 1; *The Health and Medical Services Act 1982:763* (Sweden) s 1.

<sup>23</sup> *Circumcision of Boys Act 2001:499* (Sweden) s 3.

<sup>24</sup> *Circumcision of Boys Act 2001:499* (Sweden) s 3.

<sup>25</sup> *Circumcision of Boys Act 2001:499* (Sweden) s 3.

<sup>26</sup> *Circumcision of Boys Act 2001:499* (Sweden) s 3.

<sup>27</sup> Socialstyrelsen, above n 18, 12.

<sup>28</sup> *Circumcision of Boys Act 2001:499* (Sweden) s 4.

<sup>29</sup> *Circumcision of Boys Act 2001:499* (Sweden) s 5.

<sup>30</sup> *Circumcision of Boys Act 2001:499* (Sweden) s 5.

<sup>31</sup> *Circumcision of Boys Act 2001:499* (Sweden) s 6.

must maintain sterile and hygienic operating conditions, and must only perform the procedure when a registered health professional (nurse or doctor) provides anaesthetic to the child.<sup>32</sup>

A circumcision licence can be revoked immediately if a person holding a licence performs a circumcision in an incompetent or improper manner, or is otherwise unable to carry out circumcisions to the required standard.<sup>33</sup> Illegal circumcisions are punishable by a fine or by imprisonment for up to six months.<sup>34</sup> Only five circumcisers, four Jewish and one Muslim, were granted circumcision licences in the first six years of the law's operation.<sup>35</sup> However, it seems that the sole Muslim ritual circumciser has since had his licence revoked, and was, as of 2009, wanted by police investigating the performance of a series of negligent circumcisions.<sup>36</sup> None of the 16 cases of potentially illegal circumcisions investigated in the first six years of the law's operation resulted in a conviction.<sup>37</sup> Only one resulted in a warning.<sup>38</sup> However, several investigations were ended prematurely because the circumciser involved could not be identified.<sup>39</sup>

The National Board of Health and Welfare reviewed the regulatory law in 2007 and concluded that it had been ineffective at significantly reducing unsafe circumcision practices.<sup>40</sup> The review found that the law was proving difficult to enforce, and that circumcisers had been able to act in contravention of the law without attracting the attention of the relevant authorities. The Board suspected that as many as one to two thousand illegal circumcisions were still being performed annually every year since the law came into force.<sup>41</sup> The Board, whilst not criticising the aims or the requirements of the legislation generally, argued that not enough was being done to entice or encourage people to choose legal circumcision over illegal circumcision. The Board recommended that there be better dissemination of information to the public about the regulatory regime.<sup>42</sup> It also recommended Sweden's Parliament and Government take measures to make legal circumcision more accessible to those who may be likely to utilise illegal circumcisers.<sup>43</sup>

## 7.3 The United States

It is probable that over a million newborn boys will be circumcised in the United States in 2010.<sup>44</sup> The vast majority of male children born in the United States over the last 100 years were circumcised as babies for social or cultural reasons, or, because of a belief in the potential prophylactic benefits of the procedure.<sup>45</sup> Incomplete reporting makes it impossible to know the precise prevalence of circumcision in the United States. It is likely that more than 70% of men

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<sup>32</sup> *Circumcision of Boys Act 2001:499* (Sweden) s 4.

<sup>33</sup> *Circumcision of Boys Act 2001:499* (Sweden) s 7.

<sup>34</sup> *Circumcision of Boys Act 2001:499* (Sweden) s 9.

<sup>35</sup> Socialstyrelsen, above n 18, 15.

<sup>36</sup> 'Two Boys Seriously Injured After Illegal Circumcision', *The Local* (Sweden) 19 April 2009 <<http://www.thelocal.se/18950/20090419/>> at 20 October 2010.

<sup>37</sup> Socialstyrelsen, above n 18, 23-24.

<sup>38</sup> *Ibid* 24.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid* 25.

<sup>41</sup> *Ibid* 16.

<sup>42</sup> *Ibid* 26.

<sup>43</sup> *Ibid*.

<sup>44</sup> This assumes that at least half of the male babies born in the United States in 2010 will be circumcised. Assuming that trends on known birth figures continue with approximately 2,000,000 males being born in the United States in 2010. See: Brady Hamilton, Joyce Martin and Stephanie Ventura, 'Births: Preliminary Data for 2007' (2009) 57 *National Vital Statistics Reports* 1.

<sup>45</sup> For a general discussion see: David Gollaher, *Circumcision: A History of the World's Most Controversial Surgery* (2000).

born in the United States in the middle of the twentieth century were circumcised.<sup>46</sup> It is also likely that the United States has maintained a newborn circumcision rate of between 33 and 80 percent in the twenty first century.<sup>47</sup>

The United States has not enacted a comprehensive circumcision regulatory regime. However, male circumcision is specifically referred to in provisions of state legislation in Delaware, Idaho, Illinois, Minnesota, Montana, and Wisconsin. These provisions do not create positive regulatory obligations. Instead, they establish a legislative exemption for some circumcisers from a certain type of regulatory law. For example, the provisions in Montana,<sup>48</sup> Wisconsin,<sup>49</sup> Delaware,<sup>50</sup> and Minnesota,<sup>51</sup> establish an exemption for some circumcisers from the application of medical practice laws. The provisions in Idaho,<sup>52</sup> and Illinois,<sup>53</sup> establish an exemption for some circumcisers from the application of the law in these states which criminalises ritualised abuse.

## 7.4 Analysis

The legislation in each jurisdiction is a direct product of the jurisdiction's historical experience with circumcision. Dozens, and often hundreds, of boys are seriously harmed by their participation in circumcision schools every year in South Africa. South Africa's law, bound by pragmatic considerations and a respect for the traditional initiation process, sets standards, at times lower than that which might be expected in South Africa's health services, to raise the very low hygiene, surgical and ethical standards in the many traditional circumcision schools operating in its jurisdiction. Sweden is a country largely unaccustomed to circumcision. It fears that immigrants have brought unsafe circumcision practices with them to Sweden. The legislation in Sweden attempts to: monitor ritual circumcisers; ensure that ritual circumcisers operate at a standard equivalent to circumcisers in the health community; and, encourage people seeking ritual circumcisions to utilise a health service. Sweden's government has acknowledged both

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<sup>46</sup> Edward Laumann, Christopher Masi and Ezra Zuckerman, 'Circumcision in the United States: Prevalence, Prophylactic Effects, and Sexual Practice' (1997) 277 *Journal of the American Medical Association* 1052.

<sup>47</sup> For studies suggesting a newborn circumcision rate of less than 70%, and as low as 33% see: Roni Rabin, 'Steep Drop Seen in Circumcisions in U.S.', *New York Times* (New York) 16 August 2010 <<http://www.nytimes.com/2010/08/17/health/research/17circ.html>> at 20 October 2010; Arleen Leibowitz, Katherine Desmond and Thomas Belin, 'Determinants and Policy Implications of Male Circumcision in the United States' (2009) 99 *American Journal of Public Health* 138; Caleb Nelson et al, 'The Increasing Incidence of Newborn Circumcision: Data from the Nationwide Inpatient Sample' (2005) 173 *Journal of Urology* 978. For studies suggesting a rate of over 70% see: Diana Cheng, Lee Hurt and Isabelle Horon, 'Neonatal Circumcision in Maryland: A Comparison of Hospital Discharge and Maternal Postpartum Survey Data' (2008) 4 *Journal of Pediatric Urology* 448; Segal Quayle, Douglas Coplen and Paul Austin, 'The Effect of Health Care Coverage on Circumcision Rates Among Newborns' (2003) 170 *Journal of Urology* 1533.

<sup>48</sup> *Montana Code Annotated* § 37-3-103(1)(g) (2009) (Montana) creates an exemption for '...ritual circumcisions by rabbis.'

<sup>49</sup> *Wisconsin Statute* § 448.03(2)(g) (2009) (Wisconsin) creates an exemption for: 'Ritual circumcision by a rabbi.'

<sup>50</sup> *Delaware Code* § 24-1703(10) (2009) (Delaware) creates an exemption for: 'The practice of ritual circumcision performed pursuant to the requirements or tenets of a religion; provided, however, that a person certified and registered to practice medicine in this State certifies in writing to the Board that, in the person's opinion, the circumcision practitioner has sufficient knowledge and competence to perform a ritual circumcision according to accepted medical standards.'

<sup>51</sup> *Minnesota Statute* § 147.09(10) (2009) (Minnesota) creates an exemption for: 'A person who practices ritual circumcision pursuant to the requirements or tenets of any established religion.'

<sup>52</sup> *Idaho Code* § 18-1506A(2)(b) (2009) (Idaho) creates an exemption for: 'The lawful medical practice of circumcision or any ceremony related thereto.'

<sup>53</sup> *Illinois Compiled Statutes* § 720-5/12-32(c), 720-5/12-33(b)(2) (Illinois) creates an exemption for: 'The lawful medical practice of circumcision or any ceremony related thereto'; and, in regard to the special offence of ritual mutilation: 'the practice of male circumcision or a ceremony, rite, initiation, observance, or performance related thereto'.



problems with the law's enforcement, and the need for more effective public education on circumcision and the operation of the regulatory regime.<sup>54</sup> Circumcision is widely accepted as a social, cultural and religious practice in the United States, and, a majority of American men are circumcised. Most circumcisions in the United States are performed by health care professionals, and the United States has relatively little experience with poorly performed ritual circumcisions. Lawmakers in the United States have not seen the need to regulate circumcision specifically. This is probably because it is viewed as a common, beneficial, minor, relatively safe to perform, and sometimes religiously mandated procedure. This may explain why United States lawmakers have given little attention to circumcision except when exempting circumcisers from the application of other laws.

Australia's historical experience with circumcision is unique. However, it shares some commonalities with each of the jurisdictions discussed. Australia, like South Africa, has an Indigenous circumcising population which performs circumcisions at hygiene, surgical and ethical standards significantly lower than the standards which could be expected from circumcisers within the health community. Australia's Indigenous circumcising population may also, like the Indigenous circumcising population in South Africa, be reluctant to allow considerable outsider interference into their traditionally sacred and secret circumcising traditions. An Australian regulator may also, like their South African counterparts, find it difficult to enforce a regulatory regime on traditional circumcisers. Several of Australia's jurisdictions have, like Sweden, a very low circumcision rate, and little experience with ritual circumcisers offering their services at a health and ethical standard substantially lower than that offered by local health services. An Australian regulator, like Sweden's regulator, may also find it difficult to entice ritual circumcisers to conform with the relevant law. Circumcision in Australia is also, as in the United States, widely understood to be a relatively minor and safe procedure, and it is still regularly performed in some Australian jurisdictions. The experience and law of each foreign jurisdiction considered has something to offer an Australian law reformer considering reform to the regulation of male circumcision. However, it is clear that none of the three jurisdictions discussed offers a regulatory regime particularly suited to Australia's experience with circumcision.

## 7.5 Concluding Remarks

Three of South Africa's provinces and Sweden have each introduced relatively comprehensive legislative schemes to regulate circumcision. The United States, like Australia, has taken a largely hands-off approach to the regulation of male circumcision. It refers to circumcision in law only to exclude it from the application of other laws. None of the foreign regimes considered is completely transplantable to Australia. Each was developed within a particular social and historical context. It is noteworthy, however, that jurisdictions as different as South Africa and Sweden have each experienced enforcement problems in relation to their respective regulatory regimes. Australia must, if it is to have an effective circumcision regulatory regime, develop reform in the light of its own social and historical experience with circumcision. The next chapter will endeavour to propose, building upon the analysis undertaken in the previous chapters, a regime that is uniquely suited to Australia's particular experience with circumcision.

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<sup>54</sup> Socialstyrelsen, above n 18, 26.

# Part III

## Recommendations for Reform

## Chapter 8

# Conclusion: The Way Forward

This chapter sets out recommendations to improve the legal regulation of circumcision in Australia. It summarises the main problems with the existing law identified in earlier chapters, reviews the approach adopted in chapter one to guide the analysis and proposals in this thesis, and acknowledges and discusses the obstacles to successful reform. It then identifies the principles guiding the reform proposed, and the reform proposals which flow from these principles. The concluding remarks discuss the major contributions of this thesis and the potential for future research.

## 8.1 Problems with the Form of the Current Law

Four significant problems with the form of the law which regulates circumcision have been identified. The problems are: inaccessibility, uncertainty, jurisdictional inconsistency, and unenforceability.

The law suffers from inaccessibility. It is difficult and time consuming to identify the law which applies to circumcision. The laws that apply do not, with one exception, make any reference to male circumcision or circumcising.<sup>1</sup> The applicable laws are, almost entirely, laws of general application that were not framed with circumcision in mind. These laws consist of a mix of federal and state law, and of statutory and common law. Identifying the law applicable to circumcision is an unnecessarily difficult task for parents, circumcisers, law enforcement officials, and members of the legal profession alike.

The laws regulating circumcision, when they can be deciphered, are also less than certain, coherent or comprehensive. Uncertainty is pervasive. Even important matters, such as the criminal law governing when parents may lawfully authorise a non-therapeutic procedure causing harm to their child, are unclear. Uncertainty makes it difficult for parents and circumcisers to discern how the law governs their conduct. Lord Diplock has suggested that the 'absence of clarity is destructive of the rule of law; it is unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it.'<sup>2</sup> Lack of precision in the law is liable to lead to the unfortunate condoning of questionable practices and to the misguided questioning of commendable practices.

Uncertainty can also make the determination of lawfulness a costly and time consuming exercise. For example, Finland's criminal courts have recently heard four years of appeals, at taxpayer expense, to resolve whether a mother was guilty of assault for authorising the complication free and pain managed circumcision of her four year old son.<sup>3</sup> The uncertainties in the criminal law driving the appeals in this Finnish case also exist in Australia. The law requires clarification to reinforce the application of the rule of law to circumcision, and to avoid the kind of costly and avoidable legal action that has been seen in Finland occurring in Australia.

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<sup>1</sup> *Criminal Law Consolidation Act 1935* (SA) s 22 (Example 1).

<sup>2</sup> See: *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570, 612.

<sup>3</sup> KKO:2008:93 (Finland).

There are also complicating and arguably unnecessary differences in the law between jurisdictions in Australia. There are, for example, differences between jurisdictions in the elements of the criminal offences, and the defences to these offences, which have a potential application to circumcision. These differences could result in the legality of circumcision differing from jurisdiction to jurisdiction. The law limiting when private actions may be brought by people injured as incapable minors also differs significantly between jurisdictions. Many of the differences are unintentional, unwarranted, and undesirable. The differences are liable to encourage the spread of mixed messages as to the law governing circumcision in Australia. They may complicate the practice of circumcision for circumcisers who operate in more than one legal jurisdiction.<sup>4</sup> They may also allow individuals to subvert the law in their own jurisdiction by travelling to jurisdictions with more amenable laws. Australian law would benefit from reform to establish greater consistency between jurisdictions.

There are also problems with the enforceability of some of the laws governing circumcision. These problems are the result of causes embedded in both the law and the circumstances in which circumcisions are performed. For example, most people circumcised in Australia are, by virtue of their immature age, unable to make a complaint or bring an action in a timely manner. A conflict of interest may prevent some people responsible for minors who cannot bring an action themselves from bringing an action on the minor's behalf. There is sometimes little incentive for a person to bring an action on behalf of their child. The system established by family law for the authorisation of 'special medical procedures' is an area which suffers from a lack of enforcement incentives. Limitations law may even preclude some actions being brought by adults for harm they suffered as a minor in some circumstances. The law regulating circumcision will not be effective until the issues with its enforceability are addressed.

The law regulating circumcision in Australia requires reform to overcome the issues of inaccessibility, uncertainty, jurisdictional inconsistency, and unenforceability. The following section addresses the key difficulty which exists in addressing problems with the substance of the law.

## 8.2 The Problem of Conflicting Conceptual Influences on Law Reform

An implementation minded law reformer will endeavour to ensure that the substantive law governing a matter has broad appeal. However, determining the viewpoint from which to adjudicate the merit of a particular reform proposal is a difficult task. The scope of disagreement in society over circumcision's merit and the proper shape of circumcision's regulatory regime, which was canvassed in chapter two and referred to throughout this thesis, is a problem that must be addressed. Isaiah Berlin, in his seminal essay *Two Concepts of Liberty*, acknowledged more than 50 years ago the problem of managing diverging and conflicting interests when he recognised that:<sup>5</sup>

The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others.

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<sup>4</sup> Australian *Mohels* sometimes travel between jurisdictions to offer their services in Australia: Email from Daniel Albert (President of the Hobart Hebrew Congregation) to Warwick Marshall, 26 March 2009; Email from David Clark (Vice-president of the Hobart Hebrew Congregation) to Warwick Marshall, 24 March 2009.

<sup>5</sup> Isaiah Berlin, *Four Essays on Liberty* (1969) 168.

The circumcision debate is characterised by this kind of conflict: conflict between claims that are equally absolute, and between ends that are equally ultimate.

A law reformer will, on some occasions, be forced to make a choice between two potentially beneficial but conflicting ends. This choice will sometimes require the making of a trade-off that results in a loss which is not entirely compensated for by what is gained.<sup>6</sup> The circumcision debate involves several contests of this type. These contests often pit value against value, and, as political philosopher John Kekes has recognised, ‘...as one of two conflicting values is chosen, so the agents must put up with missing out on the other.’<sup>7</sup> A law reformer cannot, in practical terms, formulate a regime which is capable of completely pleasing both a circumcision abolitionist and an Orthodox Jewish *Mohel*. Nor can they promote every traditional circumcising practice whilst also maximising the health and ethical standards of all circumcisers in Australia.

An implementation minded law reformer does not have the luxury of regarding any significant conceptual influence present in society as solely the product of ignorance, naivety, stupidity or perversity. As legal philosopher David Enoch has warned, they must resist the temptation to:<sup>8</sup>

‘...heroically ignore the scope of disagreement, creatively invoke non-existent consensuses - overlapping or otherwise - and in other ways attempt to solve problems by pretending that they do not really exist.’

There is, as a matter of reality, no immediately clear path to follow for a law reformer concerned with proposing a regulatory regime that has the best chance of being implemented. The next section briefly reiterates the methodology adopted, that of the implementation minded law reformer, to determine the path of the reform recommended in this thesis.

### 8.3 The Methodology of the Implementation Minded Law Reformer

This approach is used to navigate the complexities of the diverging and conflicting conceptual influences in the circumcision debate. The perspective is pluralistic, deeply concerned with legal, political and evidential reality, and committed to discerning law reform recommendations that most Australians can be persuaded with rational argument to accept. The approach is deliberately cautious and inclusive because it is concerned with implementation, and framed with the management of the conflicting conceptual and political influences in mind. It is for this reason somewhat loss-, risk-, and, to a considerable extent, ambiguity-averse. It generally favours the status quo, or weak action, when a clearly preferable course of action does not exist.

However, the approach adopted recognises that prevailing norms and politics can change, and that law reform can, and should, take the lead on some matters by tackling practices that are supported by unpersuasive or logically inconsistent arguments. A law reformer should, in this way, provide leadership when proposing reform. Nevertheless, what most Australians can accept, or will ultimately come to accept, is the main driving force behind the law reform recommended in this thesis. However, no approach to law reform is capable of guaranteeing implementation.

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<sup>6</sup> This kind of choice is discussed by George Crowder in: George Crowder, *Liberalism and Value Pluralism* (2002) 98.

<sup>7</sup> John Kekes, *Against Liberalism* (1997) 166.

<sup>8</sup> David Enoch, ‘Taking Disagreement Seriously: On Jeremy Waldron’s Law and Disagreement’ (2006) 39 *Israel Law Review* 22, 23.

The following section discusses several impediments to the implementation of circumcision law reform.

## 8.4 Impediments to Implementation

Implementation of a law reform agenda depends upon several factors, most of which are out of the control of a person devising law reform. Anyone considering reform to the regulation of male circumcision is, in fact, confronted with two realities: that there are significant problems with the current law which can only be addressed by changes to the law; and, that the reform they recommend will almost certainly not be implemented in the near future. This section briefly discusses the main reasons why the implementation of circumcision law reform is likely to take time.

Circumcision law reform is unlikely to be embraced as a priority by governments because there is little impetus for it. However, that is not to say that there is no pressure for reform. Two of Australia's state law reform organisations have considered the law regulating circumcision in their jurisdiction, and each has suggested that the law may benefit from reform.<sup>9</sup> Paul Mason, the former Tasmanian Commissioner for Children, was a particularly vocal Australian advocate for circumcision law reform.<sup>10</sup> There are also many private individuals and organisations interested in improving the regulation of circumcision.<sup>11</sup> Law reform initiatives have received media attention in Australia.<sup>12</sup> Nevertheless, Australia's nine governments and its major political parties do not have a policy on the issue. Circumcision is an emotive topic and its regulation is controversial. It would be politically risky for any Australian government to consider reform to circumcision's regulatory law. Reform is, for these reasons alone, quite unlikely to be placed on the agenda of any government in Australia any time soon. Meaningful reform will also probably be expensive, which is a further obstacle to reform.

There are also significant legal and political difficulties in implementing a coherent law reform agenda across Australia's eight state and territory legal jurisdictions. The Commonwealth Parliament cannot pass a law on a particular matter without there being a power in the *Commonwealth Constitution* to do so. There is no Commonwealth head of lawmaking power to pass a law regulating circumcision. There is no clearly apparent combination of heads of power which would allow the Commonwealth Parliament to enact a comprehensive national circumcision regime unilaterally.<sup>13</sup> A federal regulatory regime for circumcision could only be enacted if each State referred their lawmaking power over the regulation of circumcision to the

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<sup>9</sup> Queensland Law Reform Commission, *Circumcision of Male Infants*, Miscellaneous Paper No 6 (1993); Tasmanian Law Reform Institute, *Non-Therapeutic Male Circumcision*, Issues Paper No 14 (2009).

<sup>10</sup> For a discussion of the former Commissioner's view on circumcision law reform, see: Commissioner for Children (Tasmania), *Submission: Non-Therapeutic Male Circumcision: Issues Paper No 14 June 2009* (2009).

<sup>11</sup> See for example: Circumcision Information Australia, *Circumcision Information Australia Homepage* (2009) <<http://www.circinfo.org/>> at 20 October 2010.

<sup>12</sup> See for example: Andrew Darby, 'The "Cruellest Cut" May Also be Illegal', *The Age* (Victoria) 3 June 2009, 3.

<sup>13</sup> However, it is worth noting that a combination of the power to make laws as to 'divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants' and 'the people of any race for whom it is deemed necessary to make special laws' may allow the Commonwealth to pass some laws regulating circumcision, see: *Commonwealth Constitution* ss 51 (xxii), (xxvi). An argument, although perhaps unlikely to succeed, may also be made that the external affairs power may allow the Commonwealth parliament to enact regulation dealing with circumcision on the basis of one or more of the international human rights treaties Australia has ratified: *Commonwealth Constitution* s 51 (xxix). For a discussion of the potential use of the external affairs power to legislate medical ethical standards in Australia see: Loane Skene, 'Use of the External Affairs Power in Treaty Implementation: Implications for Ethicists' (Paper Presented at the Australasian Association of Bioethics and Health Law Conference, Adelaide, 14-16 February 2002).

Commonwealth Parliament.<sup>14</sup> State parliaments are usually reluctant to relinquish lawmaking power. This reluctance is likely to be particularly strong in regard to such a controversial matter as the regulation of circumcision.

Governments are only likely to consider law reform if pressure for change within the community increases. This is unlikely to occur quickly without the occurrence of an event, or series of events, to rally support for reform. Reform in Sweden only occurred after the death of a child was attributed by the media to circumcision.<sup>15</sup> The law reform process in South Africa only began after media reports of dozens of deaths occurring in circumcision schools each year.<sup>16</sup> The few publicised failures of the current regime to protect vulnerable children in Australia from undesirable and quite disturbing circumcision practices have, as yet, failed to garner nationwide attention to generate impetus for reform.<sup>17</sup> Some unfortunate events (such as the performance of circumcisions in less than ethical circumstances) may be being brushed aside as unfortunate but isolated problems rather than problems indicative of systemic faults. Other problems, particularly those associated with traditional circumcision practices, may not attract attention because: they seem remote to a society which, for the most part, only knows medicalised circumcision; does not wish to become involved in traditional practices of less mainstream cultures; and which now, almost more than at any time since the beginning of the twentieth century, is not being asked to consider circumcision as an option for themselves or their children.

The debate surrounding circumcision, and the proper form of circumcision regulation, is also still yet to fully mature. There are significant misconceptions, and strong, not yet well identified or articulated cultural biases impacting on the quality of the debate. Some of the empirical evidence, particularly as to circumcision's health benefits, remains equivocal. Much of the evidence is difficult to contextualise and most of it is difficult to express in a manner which is both accurate and easy to comprehend. Most Australians, particularly in recent years, have not had cause to consider the issues surrounding circumcision thoroughly, and are not particularly interested in the issue. Many of those who have an investment in, or that have engaged with the issue, argue passionately, but, at times, are prone to oversimplify the debate, or inaccurately state the grounds being disputed. Reform will have a better chance of being enacted once the debate over circumcision, and its regulation, advances further.

It is clear from the preceding discussion that nationwide circumcision law reform is unlikely to be implemented in the near future without a significant intervening event or maturing of the public debate. However, the issues associated with implementation do not change the fact that the legal regulation of circumcision could be improved. It is also not a reason why well formulated law reform proposals should not be made in preparation for a time when there is a greater impetus for reform. The next section identifies and explains the main principles guiding the law reform recommendations made.

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<sup>14</sup> *Commonwealth Constitution* s 51 (xxxvii).

<sup>15</sup> For a discussion to the lead up to the introduction of circumcision law reform in Sweden see: Yngve Hofvander, 'Circumcision of Boys in Sweden: Proposal for Government Regulation' in George Denniston, Frederick Hodges and Marilyn Milos (eds), *Understanding Circumcision: A Multi-Disciplinary Approach to a Multi-Dimensional Problem* (2001) 147.

<sup>16</sup> For a discussion of the circumstances of the enactment of circumcision law reform in South Africa see: Thembea Kepe, "'Secrets' that kill: Crisis, custodianship and responsibility in ritual male circumcision in the Eastern Cape Province, South Africa' (2009) 70 *Social Science and Medicine* 729; Louise Vincent, 'Cutting Tradition: the Political Regulation of Traditional Circumcision Rites in South Africa's Liberal Democratic Order' (2008) 34 *Journal of Southern African Studies* 77, 79.

<sup>17</sup> For electronic copies of a collection of news articles on one such event, see: Circumcision Information Australia, *Case study: Forced Circumcision of Australian boys: Special Report from Bundaberg* (2002) <<http://www.circinfo.org/ethics.html#bundacasestudy>> at 20 October 2010. See discussion from page 50.

## 8.5 A Guide to the Recommended Reforms

The reforms recommended are grounded upon five guiding principles. These principles are based upon a reasoned appraisal of the available empirical evidence, and should have broad appeal within Australia. The five principles are discussed in detail below.

**(1) Circumcision is a procedure which should only be able to be performed legally when there are strong and widely accepted reasons for its performance.**

The foreskin is a natural and healthy part of the male body, and circumcision is not a necessary procedure for either good health or a fulfilling life for the vast majority of Australians. Circumcision has inherent known and potential costs, including: a negative impact on several aspects of the circumcised person's health (see discussion from page 16), and the risk of the person circumcised suffering from complications ranging from greater than expected bleeding to death (see discussion from page 19). Most circumcisions involve a financial cost. The circumcision of an incapable minor also involves an encroachment on one or more aspects of the child's autonomy (see discussion from page 32). Because of these costs circumcision is considered, for the purpose of devising the recommended reforms, to be a procedure which should not be performed unless there are strong and widely accepted reasons to do so.

**(2) Uncircumcised adults, and capable minors, should have the right to determine their own circumcision status, and, generally, the right to determine the circumstances of their circumcision if they wish to be circumcised.**

Adults, and capable minors, should be free to be circumcised if they consider there to be good cause for doing so. This principle is grounded upon the concept of autonomy which was discussed in detail in chapter two, and which has widespread support within Australia. The ability of an uncircumcised adult or a capable minor to determine their own circumcision status is, accordingly, one which should only be abridged in the rarest of circumstances. There may, for example, be value in setting minimum health and safety standards that must be met by circumcisers to discourage particularly abhorrent or unnecessarily risky practices for moral, paternalistic, or public cost reasons. However, it will generally be assumed, for the purpose of devising law reform recommendations, that there will be broad community support for allowing uncircumcised adults and capable children to determine their own circumcision status, and, generally, the circumstances of their circumcision if they wish to be circumcised.

**(3) Not every reason for circumcising an incapable minor is equally strong and widely accepted.**

Most Australians accept that an incapable minor's body, especially their sexual organ, should not be interfered with without a strong and widely accepted reason to do so. This is evidenced by the nationwide prohibition on female genital mutilation.<sup>18</sup> It is also evidenced by the support for other laws protecting interferences with the body of minors in various states and territories, such as the law prohibiting the tattooing of minors in South Australia.<sup>19</sup> However, Australians differ on what

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<sup>18</sup> *Crimes Act 1900* (ACT) s 74; *Crimes Act 1900* (NSW) s 45; *Criminal Code 1983* (NT) s 186B; *Criminal Code 1899* (Qld) s 323A; *Criminal Law Consolidation Act 1935* (SA) s 33A; *Criminal Code Act 1924* (Tas) s 178A; *Crimes Act 1958* (Vic) s 32; *Criminal Code Act 1913* (WA) s 306. However, the prohibitions apply to both minor and adult women.

<sup>19</sup> *Summary Offences Act 1953* (SA) s 21A.



they consider to be a strong reason, and reasonable circumstances, for interfering with the person of an incapable child. The following paragraphs assess the merit of the three main reasons for circumcising an incapable minor (namely: religious and ethnic, social tradition, and health). The assessments made shape the reforms recommended later in this chapter.

Many Australians will accept that religious or ethnic reasons ought to be regarded as capable of justifying the circumcision of some incapable children in at least some circumstances. The depth and strength of the support for religious and ethnically associated circumcision, particularly as it is practised by Indigenous Australians, Muslims, Jews, and some African Christian sects, was addressed in chapter two (see discussion of religious circumcision from page 8, and ethnicity associated circumcision from page 21). This support makes the legal proscription of the widely accepted aspects of the circumcision practices supported by these groups unlikely and arguably undesirable. Proscriptive law reform is also likely to be ineffectual in discouraging many proponents of religious circumcision. This is because some groups consider circumcising incapable children as an unbreakable commandment from God which ought to be followed regardless of the prevailing law.<sup>20</sup>

However, traditions, including religious and ethnic traditions, are often in a state of evolution, and the law ought to, to the extent it can do so efficaciously, encourage the modification of traditions towards better health and ethical standards.<sup>21</sup> Less accepted aspects of traditional practices, particularly those which are neither mandated, nor particularly well regarded within a particular tradition or in society generally, such as the use of unsterile tools or methods, should rightfully be the subject of condemnatory law. The law should also endeavour to create conditions to encourage people to act in less dangerous and ethically contentious ways. Both South Africa and Sweden have adopted this approach to regulating traditional circumcision practices in their jurisdictions (see discussion from page 134). A similar regulatory approach, shaped to fit Australian circumstances, should be supported widely.

Most Australians, in contrast to their likely acceptance of at least some well accepted religious and ethnic associated circumcision traditions, are unlikely to accept circumcising incapable minors for secular non-ethnicity related social reasons in the future. Australia's social and cultural circumcising tradition was discussed in detail in chapter two (see discussion from page 27). It is a tradition which, although once the norm, has since been abandoned by the majority of Australians. Nevertheless, a significant portion of the general populace still believe that there is some merit in circumcising their male children for several often ill-defined or empirically weak reasons (see discussion from page 27). It cannot be said, because of this support, that all Australians will immediately accept a prohibition on circumcisions performed on incapable children for these reasons.

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<sup>20</sup> Jewish circumcision has been banned or heavily discouraged on several occasions throughout history. Jewish sources suggest that King Antiochus IV Epiphanes who ruled Asia-minor instituted a ban, with severe punishments, on circumcision around 175 to 165BCE. For a brief discussion see: David Gollaher, *Circumcision: A History of the World's Most Controversial Surgery* (2000) 15-16. For an earlier source see: Book of Maccabees 1:46-67; 6:10. The Roman Emperor Hadrian may also have regulated circumcision around 130CE prior to the Bar Kokhba Revolt, see: Alfredo Rabello, 'The Ban on Circumcision as a Cause of the Bar Kokhba's Rebellion' (1995) 29 *Israel Law Review* 176. The ancient Roman legal text *The Digest of Justinian* also bans circumcision in some circumstances, see: *The Digest of Justinian* 48:8:11. The Soviet Union prohibited Jewish circumcision at times. For an interesting discussion of circumcision in one part of the Soviet Union see: Elissa Bemporad, 'Behavior Unbecoming a Communist: Jewish Religious Practice in Soviet Minsk' (2008) 14 *Jewish Social Studies: History, Culture, Society* 1.

<sup>21</sup> This point has been made in work considering the regulation of traditional circumcision practices in South Africa, see: Louise Vincent, 'Cutting Tradition...', above n 16, 86.

However, the practice of circumcising incapable children for secular social and cultural reasons is not unshakeably entrenched. The reasons commonly proffered by proponents of secular social circumcision are not accepted as valid for most other irreversible external body modifications on incapable children. This is an area in which law reform should, and could, effectively take the lead. The law should endeavour to extinguish what is a weakening and increasingly ethically contentious tradition of irreversibly altering the sex organs of incapable boys for aesthetic, empirically unsound, or weakly entrenched and unsubstantiated social reasons. Legal measures, in combination with education campaigns and social influences, should be able to, and should aim to, do away with the remnants of the tradition.

The merit of the third main reason for circumcising incapable children, that of conferring circumcision's prophylactic benefits on them, is perhaps the most difficult to assess. The evidence and potential significance of circumcision's prophylactic benefits were discussed in detail in chapter two (see discussion from page 12). This discussion noted that circumcision is, quite simply, not necessary for the maintenance of a person's good health. It seems that the widespread adoption of circumcision would not be likely to confer anything more than a negligible improvement to public health in Australia, even if the potential health costs were not considered and circumcision's potential benefits are accepted at their strongest. The potential individual benefits of circumcision are, for the average Australian, also likely to be negligible. Most of Australia's medical community, and its public health policy makers, do not currently believe that an increase in circumcision is capable of providing a significant individual or population health benefit in Australia. The Royal Australasian College of Physicians' most recent policy statement on the merit of circumcision as a health treatment for male infants concludes that routine infant male circumcision is not warranted in Australia.<sup>22</sup>

Furthermore, the prophylactic benefits do not currently seem to feature prominently as a reason for circumcision in Australia, and are perhaps even less likely to do so in the future. The vast majority of boys born in Australia in the decade just past (approximately 80% around Australia, and seemingly more than 90% in Tasmania, the Northern Territory, the Australian Capital Territory, Western Australia and Victoria) were not circumcised as children. Only an infinitesimal number of men in Australia request circumcision for prophylactic health reasons as adults. Circumcision's health benefits are not motivating the vast majority of Australia's medical community and health policy makers to offer, let alone suggest, the procedure for health reasons. The potential benefits are not motivating adults to circumcise themselves, and they are not motivating most Australian parents to circumcise their young boys.

However, a small minority, including some in Australia's medical community, do believe that circumcision's health benefits justify a parent circumcising their incapable child prior to the child being able to determine the matter for themselves.<sup>23</sup> This minority view is, for various reasons, which were addressed in chapter two, influential (see discussion from page 21). This minority do one or more of the following when weighing the costs and benefits of circumcising an incapable child:

- give circumcision's health benefits significantly greater weight than most Australians, the vast majority of Australia's medical community, and most people informed of the relevant evidence, are willing to do;

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<sup>22</sup> Royal Australasian College of Physicians, *Circumcision of Infant Males* (2010) 5.

<sup>23</sup> See for example: David Cooper, Alex Wodak and Brian Morris, 'The Case for Boosting Infant Male Circumcision in the Face of Rising Heterosexual Transmission of HIV' (2010) 193 *The Medical Journal of Australia* 318.

- give less weight to the value of allowing an incapable minor to make an autonomous decision later in life on whether they want to undergo the procedure;
- give less weight to the known and potential health costs of the procedure, at least when it is performed on a child.

The difference in the weight given to the first and third point is sometimes due to an insufficient understanding of either the relevant evidence supporting circumcision's benefits, or the context in which the evidence of circumcision's benefits can be interpreted meaningfully. Outdated information and social biases skew the understanding of the relevant evidence. Reforms should, at the least, aim to improve the understanding in the general public of the relationship between circumcision, health and harm, so that more people can take an informed position on the matter. There is unlikely to be greater consensus until there is wider understanding of both the medical evidence associated with circumcision, and, perhaps more importantly, the relevance of the evidence in an Australian context.

This thesis takes the position on the available evidence that there is currently no good reason for any government in Australia to encourage the circumcision of incapable minors for prophylactic reasons. Circumcision is not a procedure which needs to be performed on a minor, and it is not a procedure likely to confer a substantial health benefit to the average Australian. It is likely that most Australians, including the vast majority of Australia's medical and health policy professionals, with an accurate understanding of the evidence and its context, would support measures to discourage the routine circumcision of incapable minors for health reasons. However, the influence of supporters of circumcision for health reasons may pose an obstacle to the enactment of such measures in the short term. Reform may be difficult to implement until: education and information campaigns are initiated; developments occur in public health, and/or in science's understanding of the interrelationship between circumcision and health; and these begin to generate greater consensus on the merit, or perhaps rather the lack of merit, of circumcision as a health measure in Australia.

**(4) The law regulating circumcision in Australia should endeavour to improve the health and ethical standards of all circumcisers to the greatest extent practicable.**

There is, as discussed in chapter two, significant support within Australia for improved health and ethical standards for all circumcisers (see discussion from page 21).

**(5) The form of the law regulating circumcision in Australia should be as accessible, certain, consistent and enforceable as is practicable to achieve its substantive ends.**

The weaknesses of the current form of the law regulating circumcision were identified at the end of each chapter. These weaknesses were summarised at the start of this chapter (see discussion from page 141). There would be broad community support for efforts to reform the law regulating circumcision to make it more accessible, certain, consistent, and enforceable.

## **8.6 Recommended Law Reform**

The problems with the current law can only be overcome by passing legislation to alter the law currently governing circumcision. This thesis recommends the enactment of a federal Circumcision Act, or, if need be for implementation reasons, mirror Circumcision Acts in each Australian state and territory, on which to build a new regulatory, licensing, and monitoring regime for circumcision. This regime would allow some circumcisions in certain circumstances,

subject to certain health and ethical safeguards, to be performed legally. The details of this proposed regime are discussed below.

### **Cornerstone Legislation**

Legislation is the most effective way to make the law more understandable and accessible for circumcisers, the legal profession, and the public. Greater understanding and accessibility will help foster greater consistency between the practice of circumcision and the law. A dedicated Act would allow for all or most of the main regulatory law relevant to circumcision in a jurisdiction to be contained in a single document. Either legislative approach suggested, that of a federal Act, or of several mirror state and territory Acts, is capable of ensuring considerable consistency, accessibility and certainty in the law regulating circumcision. The former approach should provide greater consistency but would be more difficult to implement. Mirror Acts may allow individual jurisdictions to better manage their own transition to the new regime. They may also more easily allow individual jurisdictions to tailor elements of their circumcision regime, which do not need to be particularly uniform with other jurisdictions, to their own needs and circumstances.

### **The Establishment of a Regulatory Licensing Regime**

The proposed regime should endeavour, as far as it is practicable and beneficial to do so, to set uniform national standards and procedures to follow for all circumcisers and people involved in the performance of circumcision. The relevant Act should establish a circumcision regulatory, monitoring and licensing body within the jurisdiction it operates in (whether Australia wide under a federal Act, or an individual state or territory under a state or territory Act). A licensing regime, with a dedicated enforcement body, would provide the best means through which the practice can be meaningfully regulated, the standards of the practice raised, and information on circumcision collected and disseminated. This regulatory body should be empowered, within the jurisdiction it operates in, to: grant licences to circumcisers; monitor compliance with the jurisdiction's Act; set some of the requirements circumcisers or people otherwise involved in a circumcision have to meet; and, monitor and/or administer various services related to the regime established by the Act.

The Circumcision Act should make the performance of circumcision without a licence, or outside the terms and conditions of holding a licence (set by both the Act and by regulations made by the regulatory body), punishable by criminal sanctions. The Act and the regulator ought to establish procedures for the granting, revoking, suspending, and appealing of the revocation or suspension, of a licence. Circumcisers should have to provide evidence that they meet certain conditions before they are granted a licence. Circumcisers should also have to meet several conditions once in possession of a licence. The nature of the potential requirements and conditions are discussed further below. Sanctions for non-compliance with the licensing requirements might include the loss or suspension of the circumciser's licence, fines, or even imprisonment.

The standards and procedures set by the Circumcision Act (whether it be a Federal Act or several State and territory Acts) should be as consistent across Australia's state and territory jurisdictions as possible. The standards and procedures in the Act itself ought to be concerned with general matters and principles, and should be designed to be adaptable to evolving circumstances and prevailing community standards within the jurisdiction they operate in. The regulatory body within a jurisdiction should be made responsible for passing regulations to supplement and

qualify the standards and procedures set within the Act. The standards and procedures set by the regulator ought to be more detailed, and more problem and circumstance specific.

The scope of the regulator's lawmaking power ought to be clearly defined within the Act that governs circumcision practices in the jurisdiction it operates in. It would be desirable to grant the regulator the power to address a broad spectrum of problems (at least those concerning health and ethical standards), including problems that are jurisdiction wide, or which are place and circumstance specific. This approach should be taken whether a federal regulator dealing with Australia wide problems is adopted, or, several state and territory regulators are established to address problems within their particular jurisdictions.

The regulator would also be entrusted with consulting, interacting and working with traditional circumcision practitioners in their jurisdiction, and formulating pragmatic regulations to improve the health and ethical standards of these circumcisers.<sup>24</sup> Circumcision licensing regimes have proven to be difficult to enforce overseas (see discussion from 138). The regulator must, to aid in the proposed regime's enforcement, engage with circumcising communities and endeavour to entice ritual and traditional circumcisers to operate in accordance with the law. The regulator should be empowered to offer incentives and provide education to achieve this end.

The regulations passed by the particular regulatory body, and the operation of the Act itself, should be regularly reviewed by the regulatory body itself, the parliament which established the regulatory body, and perhaps an independent body responsible to the parliament that established the regulatory body. These reviews should ensure that the regime remains as current as possible with best practice and political reality. If several state and territory regulatory bodies are established they should meet regularly and cooperate to ensure that uniformity between jurisdictions is maintained on core matters.

The regulatory body operating in a jurisdiction should also be entrusted with gathering data on circumcision. These data ought to be collected and used to ensure that an informed and evidenced based approach to regulating circumcision is maintained. The collection of information should also assist in the just settlement of legal actions involving a circumcision.

The proposed lawfulness of circumcisions performed for various reasons, and reforms to improve health standards, ethical standards, the law governing the use and sale of excised foreskin, and, the period in which an action ought to be able to be brought, are discussed below.

### **The Proposed Lawfulness of the Main Reasons for Circumcision**

The Act ought to explicitly recognise the lawfulness of circumcisions performed on adults and capable minors at their request, so long as the circumcision is performed in accordance with the standards and procedures set by the Act and the regulator. This should be clearly stated in the Act, and should not be something alterable by the regulator. The Act should also make it clear that a person may not be circumcised if they do not wish to be circumcised.

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<sup>24</sup> Several issues with traditional circumcision practices that will need to be appreciated and addressed by regulators were raised in chapter two, see discussion from page 26. A study in South Africa suggests that education and training can lead to significant improvements in health and ethical standards of traditional circumcisers, see: Karl Peltzer et al, 'Evaluation of a Safer Male Circumcision Training Programme for Traditional Surgeons and Nurses in the Eastern Cape, South Africa' (2008) 5 *African Journal of Traditional, Complementary and Alternative Medicines* 346.

The Act ought to contain a general prohibition on circumcising incapable minors. This prohibition should be made prominent within the Act to enshrine the principle that circumcision is not a procedure which should be performed without strong and widely accepted reasons.

The Act ought to contain an express exception to the general prohibition on circumcising incapable minors for some religious and ethnicity motivated circumcisions. The exception in the Circumcision Act should only extend, as far as possible, to religious circumcisions of incapable minors when they are of a kind that cannot be delayed without substantial harm, or significant controversy, until the child can determine themselves whether they wish to be circumcised. The precise limits of this exception should only be set after significant community consultation. Parliament should consider including the following matters as requirements for an excepted religious or ethnicity associated circumcision: evidence that each parent of the child believes there are strong religious or ethnicity associated reasons for circumcising their child before their child can determine the matter themselves; and, evidence that the child will be raised in a way that will encourage the child, once mature, to accept their parent's decision to circumcise them at the relevant time. The religious and ethnicity associated exception should operate as uniformly as possible throughout Australia. However, there should be scope for provisions in the relevant Circumcision Act, or perhaps qualifying regulation passed by the relevant regulator, to adapt the religious and ethnicity associated circumcision exception operating throughout Australia to the traditional circumcision practices particularly prevalent or important in particular localities.

Circumcisions performed on incapable minors for secular social reasons should be prohibited in Australia. They should not, for reasons discussed earlier in this chapter (see discussion from page 147), be made exempt from the general prohibition on circumcising incapable minors. However, the lingering support remaining for circumcision for social reasons in Australia should be accounted for. The prohibition against circumcisions performed on incapable minors for social reasons should not come into force until there has been time to educate circumcision practitioners, and the general public, on the scope, effect and rationale of the prohibition. The period of time needed for such an education campaign could be provided by delaying when the Act, or just the prohibition against circumcising incapable minors, comes into force. Alternatively, the legislation could provide for a sunset clause excepting the performance of social circumcisions on incapable minors from the general prohibition for the period of time in which the education campaign is to run.

The Circumcision Act should not create a permanent exception for circumcisions performed on incapable minors for prophylactic health benefits. The Act should reflect the present lack of a clear health imperative for circumcising incapable minors in Australia, and the law should assist in educating the public that there are significant costs to circumcising, and no strong health reason for circumcising an incapable minor now or, seemingly, in the future. However, the law may also need to account for the influential minority of Australians who believe that the potential health benefits to circumcising incapable minors are significant. An approach somewhat mirroring the one suggested for the circumcision of incapable minors for secular social reasons ought to be taken. This approach involves prohibiting circumcising incapable minors for prophylactic health reasons only after an educational and transitional period to educate circumcision practitioners, and the general public, has expired. The focus should be on informing practitioners, and the general public, of accurate information about circumcision's effect on both individual and public health in an Australian context.

Education provided on the Act operating in a jurisdiction should stress that the Act allows capable minors and adults to choose to be circumcised themselves for any reason they consider worthwhile, including reasons of health, secular or ethnic social reasons, and religion. The law

must not operate to limit when a capable person may elect to undergo a circumcision. The prohibition on circumcising incapable minors, and the exceptions to the prohibition, should, once in force, be reviewed periodically to ensure that it remains desirable in light of changing circumstances and community understandings.

## Health Standards

The regime should set some general health standards for circumcision practitioners. These standards might include: the use of anaesthesia, the use of sterile and proper instruments; the presence of a trained medical professional and/or anaesthetist at the circumcision; the performance of circumcision by a person with training in performing circumcisions; and, the provision of adequate wound care and post procedure monitoring. The health standards in the Act ought to reflect the minimum standards the community would expect circumcisers to meet in the circumstance in which they are operating. More specific standards ought to be set in regulations. Safe circumcising conditions should, as far as possible, be made accessible and available to all people who are to undergo a circumcision.<sup>25</sup>

## Ethical Standards

The law should be framed to improve the quality of the decision making by adults and capable minors considering being circumcised. It should focus on ensuring that people considering circumcision are provided with all the information relevant to their decision making, and, in particular, that they have a sound understanding of the possible consequences of their decision if they choose to be circumcised. This may include, for example, the requirement that a person be provided with counselling on certain matters prior to being circumcised. The law may also direct a circumciser on the information they may impart to a person when promoting their service or informing an interested person of relevant information.

The Act and the regulatory body should establish conditions that must be met, and procedures that must be followed, to ensure that the highest ethical standards consistent with circumcising minors are adhered to. The Act, or regulations, should, for example, require circumcisers considering circumcising a potentially incapable minor to provide the regulatory body with the following evidence:<sup>26</sup>

- written evidence, affirmed by both the parents and the circumciser, that the parents of an incapable minor have been informed of all the information relevant to their decision to authorise the circumcision of the minor, and still wish to have the circumcision performed;
- written evidence, affirmed by both parents and the circumciser, (as well as the child wherever possible), that the child has been informed of, and understands, all the relevant information to the fullest extent possible and to the best of their ability, and does not oppose being circumcised;

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<sup>25</sup> For arguments in favour of easily accessible and subsidised or free hospital circumcision services, see: Karthikeyan Paranthaman, Jayshree Bagaria and E'amon O'Moore, 'The Need for Commissioning Circumcision Services for Non-Therapeutic Indications in the NHS: Lessons from an Incident Investigation in Oxford' (2010) *Journal of Public Health* <<http://jpubhealth.oxfordjournals.org/content/early/2010/07/14/pubmed.fdq053.full.pdf>> at 20 October 2010; Socialstyrelsen, *Omskärrelse av pojkar: Rapport av ett regeringsuppdrag (S2005/7490/SK)* (2007) 26. However, the support for publicly funded hospital circumcision is not universal within the literature, see: Margherita Brusa and Y Micheal Barilan, 'Cultural Circumcision in EU Public Hospitals - An Ethical Discussion' (2009) 23 *Bioethics* 470.

<sup>26</sup> Reference to both parents in this discussion should be taken to include the natural parents of the child, and any other guardian of the child.

- written evidence as to the reason for the circumcision, and as to why the circumcision ought not to be delayed until the child matures to decide the matter themselves;
- written evidence, affirmed by the counsellor and the parents, that counselling has been provided to the child, and their parents, by an independent party about circumcision and its potential effects; and,
- written evidence as to the procedure and method to be utilised.

A circumcision ought not to be performed by a circumciser until they have sent this information to the regulatory body, and the regulatory body has authorised the performance of the circumcision. The regime should also require circumcisers to report the result of the circumcision to the regulatory body after the circumcision is performed. The regulatory body should keep detailed records on every circumcision performed.

The regime should also establish a process for determining the legality of a circumcision when there is a risk that its performance may be illegal in the circumstances because of uncertainty over whether a condition required for a lawful circumcision exists. The process should involve recourse to an independent arbiter, perhaps a tribunal or a court, to determine the legality of the procedure. This process should be able to be initiated by the regulatory body, the circumciser, the child's parents, the child's relatives, and perhaps any other person interested in the child's welfare.

### **The Use and Sale of Excised Foreskins**

The regime could also clarify the law relating to the use and sale of excised foreskins. Relatively little attention has been given to the matter in this thesis (see discussion from page 110). It may be desirable to implement specific regulations limiting when, and how, people, including the person circumcised, the circumciser, and others, may use and profit from excised foreskins. Significant community and industry consultation will have to occur before the proper balance is found between: the person circumcised benefiting from any use or sale of their foreskin; the person using the foreskin benefiting from the use or sale of the foreskin; the availability of the tissue for benevolent purposes (such as research); and a multitude of other potential ethical considerations. Many of the problems with the law governing the use and sale of excised foreskins are not specific to excised foreskin. It may be better for reform to address the matter of the use and sale of excised human tissue generally within legislation devoted to human tissue rather than an Act dealing specifically with circumcision.

### **A Uniform Limitation Period**

The Circumcision Act, or Acts, should create a uniform limitation period for civil actions brought for harm sustained by a circumcision as a minor. The period set should allow people injured by a circumcision as a minor reasonable time to bring an action as an adult who is aware of the potentially wrongful circumcision.

## **8.7 Concluding Remarks**

This thesis seeks to provide a thorough analysis of the application of Australian law to circumcision. It argues for a comprehensive regime designed to improve the legal regulation of circumcision. It reviews specialised circumcision regulatory law in jurisdictions outside of Australia. It also contains original research into how circumcision is being practised in Australia, marshals all the information necessary to gain a complete picture of the circumcision debate, and,



suggests how this information, and the proponents in the debate, may influence the law reform process. The implementation minded law reformer perspective, a dispassionate, pragmatic, and pluralistic approach, provides the framework for the discussion of the law, the differing views of the various stakeholders, and the proposals for reform.

Circumcision in an Australian context, several aspects of the circumcision debate, and many issues with the law regulating circumcision in Australia, would benefit from further research. Researchers could, for example, undertake field studies to better inform the analytical perspective utilised in this thesis. This research might seek to discover: an empirically tested understanding of prevailing community beliefs; and, a better picture of how these beliefs might change if the public were to consider various arguments and information. Researchers could empirically test the accuracy of the speculation made in this thesis as to the level of support within Australia for the various law reform measures proposed.

There are also several areas of law addressed in this thesis which would benefit from further research and analysis. The comparative analysis undertaken of the law in foreign jurisdictions was, for example, limited. Further comparative analysis, particularly as to the effect of the relatively new circumcision regulatory regimes established in Sweden and South Africa, could better inform the development of an effective regulatory regime in Australia. There are also several areas of law, such as the criminal law on consent to harm, and the law governing the use and sale of human tissue, which apply in an uncertain way to both circumcision and several other activities. Further research into other uncertain applications of the law, e.g. into such areas as the lawful authorisation of harm caused to children by non-therapeutic interferences other than circumcision, and may enhance the understanding of the proper application of the law to circumcision.

Changes to: prevailing norms; the understanding of circumcision's effect on a person in an Australian context; and the law, may raise fresh issues for inquiry. The adoption of law reform in particular, should it happen, will present a range of opportunities to evaluate the effect of the reform to the practice of circumcision in Australia.

There is still much left to discover or determine about circumcision generally. It is a procedure which invites further research and analysis from a variety of different fields and perspectives. It is a practice, as was acknowledged in the introductory chapter, at the crossroads of religion, tradition, human rights, health, harm, and several philosophical concepts, including autonomy and paternalism. This thesis just focuses upon one small part of the mosaic – its legal regulation in Australia.

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